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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 654

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL., ETC., PETITIONERS,

vs.

THE WOOD PRESERVING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 21, 1940.

CERTIORARI GRANTED FEBRUARY 3, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 654

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL.,

Petitioners,

vs.

THE WOOD PRESERVING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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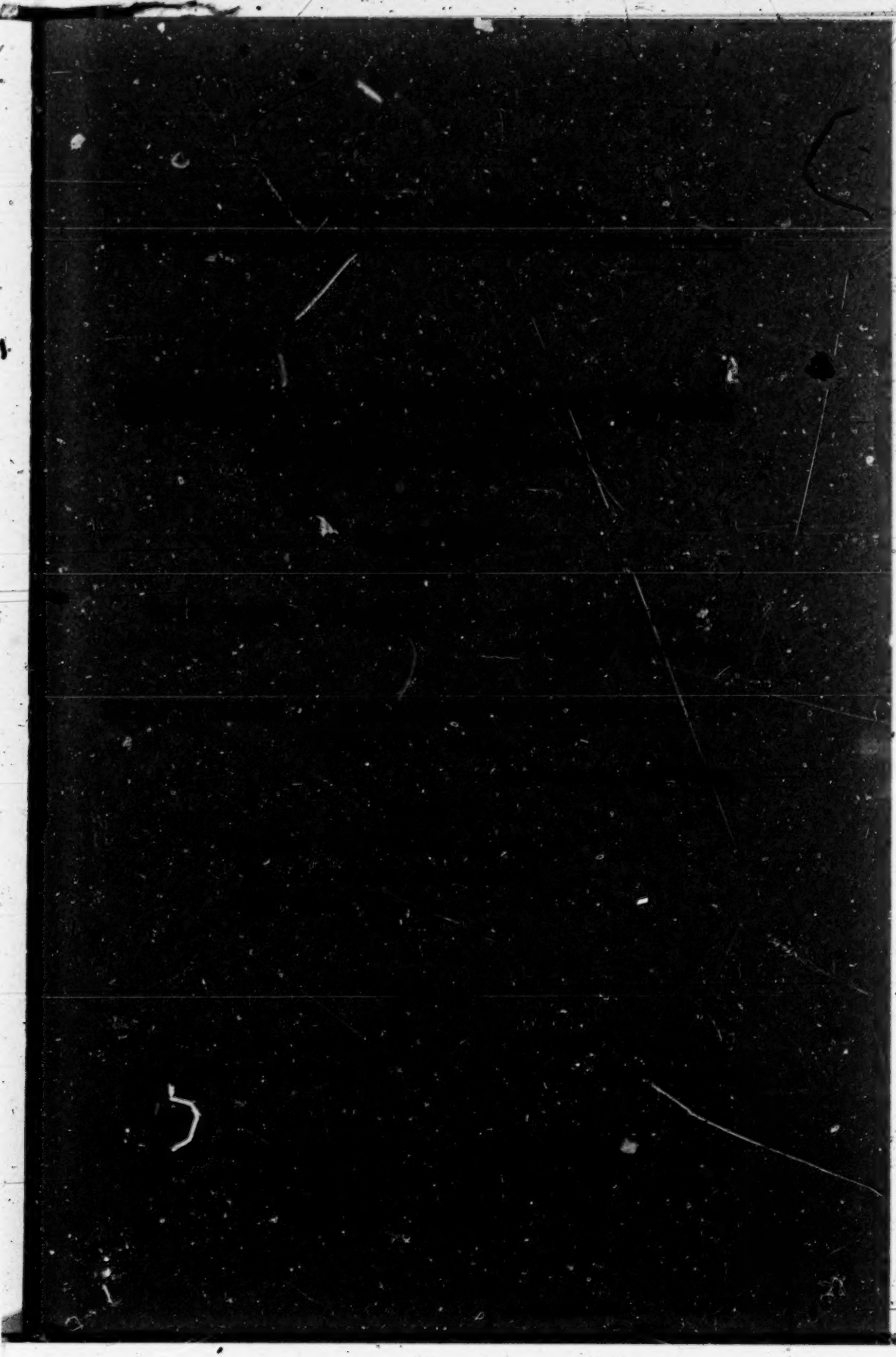

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IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 7126

THE WOOD PRESERVING CORPORATION,
Plaintiff-Appellant,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL.,
Defendants-Appellees.

Counsel for Plaintiff-Appellant:
MR. FREDERICK E. MATSON,
MR. HARRY T. ICE.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

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1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court. Placita.

The Wood Preserving Corporation
vs.
Department of Treasury of the State of Indiana, *et al.* } #8 Civil.

Be It Remembered that heretofore towit: at the May Term of said Court, on the 18th day of October, 1938, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above cause were had, towit:

Comes now the plaintiff by its attorneys, and files complaint, which is as follows:

Filed Oct. 18, 1938. 2

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

The Wood Preserving Corporation, *Plaintiff,*

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants.*

No. 8 Civil.

COMPLAINT.

Comes now the plaintiff and complains of the defendants, and for cause of action alleges that:

1. Jurisdiction is founded upon diversity of citizenship and amount. Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Pittsburgh in the State of Pennsylvania. Defendant, Department of Treasury of the State of Indiana, is an Executive Department of the State of Indiana vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chapter 50, Acts of 1933), as amended by the Acts of 1937 (Chapter 117, Acts of 1937). Defendants, M. Clifford Townsend, Peter F. Hein and Lawrence F. Sullivan, are each citizens and residents of the State of Indiana and of the County of Marion, and together constitute the Board of Department of Treasury of the State of Indiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. Jurisdiction is also founded on the existence of a federal question and amount in controversy. The additional tax sought to be recovered is alleged to have been illegally assessed under Article I, Section 8 of the Con-

stitution of the United States and Amendment 14 of
3 the Constitution of the United States, and the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

3. On or about the 5th day of August, 1937, there was assessed against the plaintiff an additional gross income tax, together with interest, for the year 1934 in the amount of Two Thousand Four Hundred Forty-four Dollars and Seventy-nine Cents ($2,444.79), for the year 1935 in the amount of One Thousand Eight Hundred Seventy-six Dollars and Forty-one Cents ($1,876.41) and for the year 1936 in the amount of Two Thousand One Hundred Twenty-one Dollars and Twenty-seven Cents ($2,121.27), making a total of Six Thousand Four Hundred Forty-two Dollars and Forty-seven Cents ($6,442.47). The additional tax was assessed against the plaintiff on receipts of the plaintiff arising from transactions which are hereinafter more particularly described.

4. Thereafter, within the time allowed by law, and on or about the 21st day of October, 1937, plaintiff, on forms prescribed by the defendant Department of Treasury, filed a statement for refund of the tax assessed for each year, with the Department of Treasury, Gross Income Tax Division. Accompanying said statement for refund and incorporated as a part thereof was a petition for refund of the tax paid in which there was set forth at length the facts constituting the ground of plaintiff's objections to the assessment of the additional tax. After a hearing before the Gross Income Tax Division, and on the 18th day of August, 1938, the plaintiff, through the Department of Treasury, Gross Income Tax Division, was advised that plaintiff's statements and petitions for refund of taxes paid for each of the years in the amounts above stated were disallowed and the refund denied. The defendants have wholly refused to pay to the plaintiff any portion or all of the tax so paid for each of the years.

4 5. The receipts upon which the additional tax for each of the years was assessed arose out of the following course of transactions:

The receipts of plaintiff were from the Baltimore and Ohio Railroad Company (hereinafter referred to as "the Railroad"), received as payment for treated cross-ties sold by plaintiff to the Railroad. Raw (untreated) cross-ties so sold were delivered along the right-of-way of the Railroad in the State of Indiana, and were there inspected by agents of the plaintiff and of the Railroad and placed

f.o.b. on cars of the Railroad pursuant to the terms and conditions of a certain contract between the Railroad and the plaintiff. Under said contract, and pursuant to an understanding with the Railroad, a portion of the raw cross-ties were immediately carried by the Railroad to a creosoting plant of the plaintiff located at Green Spring, West Virginia, which plant was leased by the Railroad to the plaintiff under said contract, and said ties were there subjected by plaintiff to a treating process and re-delivered to the Railroad at Green Spring, West Virginia, and ultimately used by the Railroad throughout the several States in which it operates. All of the balance of such raw cross-ties were carried by the Railroad to a creosoting plant at Finney, Ohio, owned and operated by National Lumber & Creosoting Company, one of plaintiff's subsidiary corporations, and were there subjected to a treating process and redelivered to the Railroad at Finney, Ohio, and ultimately used by the Railroad throughout the several States in which it operates. The raw ties so delivered by the plaintiff and loaded on cars of the Railroad along the lines of the right-of-way of the Railroad within the State of Indiana, were as aforesaid inspected at the point of delivery by agents of plaintiff and of the Railroad and were accepted as of suitable grade and quality. Copies of the inspection reports of the agents of the Railroad were forwarded immediately to the office of the plaintiff at Marietta, Ohio, and there an invoice addressed to the Railroad was prepared by plaintiff and sent to the principal office of the Railroad at Baltimore, Maryland. Duplicate copies of the invoice were forwarded to the principal office of plaintiff at Pittsburgh, Pennsylvania. All invoices were at unit prices for treated ties f.o.b. cars at the originating points. All payments to the plaintiff were made by bank drafts drawn on Pittsburgh banks for such invoices and deposited then in Pittsburgh banks. All bookkeeping transactions, other than those stated, were carried on at Pittsburgh by the plaintiff. Plaintiff in none of the years in question had an office of any kind in the State of Indiana, kept no books in Indiana, received no funds in Indiana, and all agents of plaintiff worked out of plaintiff's Pittsburgh office.

6. Plaintiff has been improperly charged with the tax herein referred to and has been required to pay the same, and is entitled to recover the amount so improperly collected for the reason:

(a) That the receipts from the transactions aforesaid,

upon which the tax for the years in question was based, are receipts derived from business conducted in commerce between this State and other States of the United States, which under the terms and provisions of Section 6(a) of the Gross Income Tax Act of Indiana is exempt from taxation (Section 6(a), Chapter 50, Acts of 1933; Section 6(a), Chapter 117 of the Acts of 1937).

(b) That if said receipts are not exempt under the provisions of Section 6(a) of said Act, then said Act is invalid and void and said assessment illegal as to the tax on such receipts for the reason that the tax assessed constitutes a regulation of and a burden upon commerce between the State of Indiana and other States of the United States, in conflict with Article I, Section 8 of the Constitution of the United States.

(c) That plaintiff's receipts or proceeds from such transactions are not received in the State of Indiana,
6 and do not constitute receipts subject to provisions and terms of the aforesaid Gross Income Tax Act.

(d) That if said Act be construed to permit the State of Indiana to tax receipts not received within the State, then said Act as to the tax on such receipts is illegal and void for the reason that it is in conflict with the 14th Amendment of the Constitution of the United States in that it deprives the plaintiff of property without due process of law.

Wherefore plaintiff prays judgment against the defendants in the amount of Six Thousand Four Hundred Forty-two Dollars and Forty-seven Cents ($6,442.47), together with interest thereon from the date of payment; and for all other proper relief in the premises.

(Signed) Frederick E. Matson,
(Signed) Harry T. Ice,
Attorneys for Plaintiff.

Matson, Ross, McGord & Clifford,
951 Consolidated Building,
Indianapolis, Indiana,
Of Counsel.

7 (Further entry for October 18, 1938.)

And thereupon there issued out of the office of the Clerk of this Court, a writ of summons to the United States Marshal, for said defendants.

And afterwards towit at the November Term of said Court, on the 7th day of November, 1938, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Come now the defendants by their attorneys, and file answer, which is as follows:

Filed Nov. 7, 1938.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—8) * *

ANSWER.

Come now the defendants Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Laurence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana, and for answer to the plaintiff's complaint herein state:

1. The defendants admit so much of the paragraph designated as "1" of the plaintiff's complaint as alleges that the jurisdiction is founded upon diversity of citizenship and amount, that the plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Pittsburgh in the State of Pennsylvania, and further that the defendant Department of Treasury of the State of Indiana is an executive department of the State of Indiana vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chapter 50, Acts of 1933) as amended by Chapter 117 of the Acts of 1937; and further that the defendants M. Clifford Townsend, Peter F. Hein and Laurence F. Sullivan are each citizens and residents of the State of Indiana and of the County of Marion, and that together they constitute the Board of the Department of Treasury of the State of Indiana and are made defendants in the present action in their official capacities as such of the Department of Treasury of the State of Indiana and not otherwise, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "2" as alleges that

jurisdiction is also founded on the existence of a claimed federal question and amount in controversy, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00); but the defendants deny the allegation that the gross income taxes sought to be recovered in this action were illegally assessed in view of the provisions of Article I, Section 8 of the Constitution of the United States of America, and of Amendment 14 of the Constitution of the United States of America, and that the defendants specifically deny
11 that the gross income taxes sought to be recovered in this action were either erroneously, illegally, unlawfully or unconstitutionally assessed or collected.

3. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "3" as alleges that on or about the fifth day of August 1937 the State of Indiana acting through its Department of Treasury of the State of Indiana assessed against the plaintiff an amount representing a gross income tax for the year of 1934 (which amount was in addition to the taxes previously paid by the plaintiff) and which amount, together with interest, was in the sum of two thousand four hundred forty-four dollars and seventy-nine cents ($2,444.79); further that on the same day the State of Indiana acting through its Department of Treasury of the State of Indiana assessed against the plaintiff gross income taxes for the year of 1935 in the amount of one thousand eight hundred seventy-six dollars and forty-one cents ($1,876.41); and further that the State of Indiana acting through its Department of Treasury of the State of Indiana assessed against the plaintiff herein gross income taxes for the year of 1936 in the amount of two thousand one hundred twenty-one dollars and twenty-seven cents ($2,121.27); but the defendants allege that the taxes assessed under the provisions of the Indiana Gross Income Tax Act are ordinarily collected upon the basis of an annual taxing period comprising the period from January first to December thirty-first inclusive of each year, and that the tax and any credits thereon are computed with regard to such annual taxing periods and not otherwise, and that in
12 no instance are periods in excess of one calendar year treated as a unit for the ascertainment or assessment of taxes under the Indiana Gross Income Tax Act and specifically that each calendar year has been treated as a separate distinct and independent taxing period with reference to the taxes assessed and collected from the

plaintiff in the present case; and the defendants and each of them further respectfully represent and show to the Court that no assessment was made against the plaintiff in this case, and that no amount is now in controversy with respect to the taxes due in any separate and individual annual taxing period mentioned in the plaintiff's complaint in which the amount collected and claimed to be due as a refund and presently in controversy, is in excess of the amounts hereinbefore set out for such individual annual taxing period.

The defendants further answering the plaintiff's complaint and particularly that part thereof designated as paragraph "3" say that they deny so much thereof as alleges that the additional tax was assessed against the plaintiff on receipts of the plaintiff arising from transactions thereinafter more particularly described, and allege that said additional tax was assessed against the plaintiff on receipts of the plaintiff arising from transactions as hereinafter particularly set out in this Answer.

4. The defendants admit so much of the paragraph designated as "4" of plaintiff's complaint as alleges that thereafter and within the time allowed by the statutes of the State of Indiana and particularly on or about the twenty-first day of October, 1937, the plaintiff filed a petition for refund of the tax assessed for each of the annual taxing periods specified in the foregoing paragraph and

13 that the plaintiff used the forms prescribed by the defendant Department of Treasury for such purpose, and that accompanying such statement or petition for refund and incorporated as a part thereof, there was set forth at length the ground of the plaintiff's objection to the assessment of the additional tax and the grounds upon which the plaintiff contended that it was entitled to a refund; that thereafter within the time allowed by the statutes of the State of Indiana, and particularly on or about the eighteenth day of August, 1938, the State of Indiana acting through its Department of Treasury of the State of Indiana, Gross Income Tax Division, advised the plaintiff that the plaintiff's petition for refund of taxes paid for each of the annual taxing periods specified in the foregoing numbered literary paragraph were disallowed, and the refund denied; it is further admitted by the defendants that the State of Indiana has not, at any time, refunded the gross income taxes in question and that the State of Indiana acting through its Department of Treas-

ury of the State of Indiana, Gross Income Tax Division, has refused to make such a refund to the plaintiff.

5(a). The defendants further answering the complaint say that they admit so much of the paragraph designated "5" in said complaint as alleges that the gross income by virtue of which the tax for each of the annual taxing periods alleged in the complaint arose out of the transactions therein set out insofar as it is alleged that the receipts of the plaintiff were from the Baltimore and Ohio Railroad Company thereinafter referred to as the "railroad" (except that some of the receipts involved were from other railroad companies) and were received as payment for cross-ties sold by the plaintiff to the railroad company,

but said defendants deny that said taxes were upon
14 such receipts and further deny that said receipts were payment for treated cross-ties and allege that said tax was measured by such receipts and that the only receipts involved in the assessment were on account of receipts for untreated cross-ties.

Said defendants further admit so much of said paragraph numbered "5" of the complaint herein as alleges that raw untreated cross-ties so sold by the plaintiff to the railroad company were delivered along the right-of-way of the railroad in the State of Indiana and were there inspected by agents of the plaintiff and of the railroad and placed on cars of the railroad pursuant to the terms and conditions of a certain contract between the railroad and the plaintiff, and said defendants admit so much of said paragraph numbered "5" of the complaint as alleges that under said contract with the railroad company a portion of the raw cross-ties were carried by the railroad to a creosoting plant of the plaintiff located at Green Springs, West Virginia, but said defendants allege that said contract was in writing; that it has no knowledge of any understanding other than as contained in said written contract and that it has no knowledge as to whether said creosoting plant was leased by the railroad to the plaintiff or not. Said defendants further say that they admit so much of said paragraph "5" as alleges that said ties wer subjected by the plaintiff to a treating process and that thereafter they were placed in custody of the railroad company at Green Springs, West Virginia, and ultimately used by the railroad throughout the several states in which it operates, but the defendants deny that any part of the gross income which was used as a measure for the additional assessments as herein alleged were

for the creosoting of said ties and allege specifically
15 that said income so used as a measure was on account of the sale by the plaintiff and the delivery by the plaintiff to the railroad company upon its right-of-way in the State of Indiana of said untreated cross-ties.

Said defendants further answering said paragraph "5" of the complaint admit so much of said paragraph "5" as alleges that all of the balance of such raw cross-ties were carried by the railroad to a creosoting plant at Finney, Ohio, owned and operated by National Lumber and Creosoting Company, one of plaintiff's subsidiary corporations, and were there subjected to a treating process after which the same were put in custody of the railroad at Finney, Ohio, and ultimately used by the railroad throughout the several states in which it operates, but said defendants deny that any part of the gross income forming the measure of the additional tax was on account of the creosoting of said ties at the plant at Finney, Ohio, or at any other plant of the plaintiff. Said defendants further admit so much of said paragraph "5" as alleges that the raw ties including those afterwards carried to Green Springs, West Virginia, and those carried to Finney, Ohio, and delivered by the plaintiff to the railroad company and loaded on cars along the lines of the right-of-way of the railroad in the State of Indiana, were inspected at the point of delivery in the State of Indiana by agents of the plaintiff and of the railroad and were accepted as of suitable grade and quality, but the defendants deny any inference which may be drawn therefrom that said raw untreated ties were not purchased by said railroad company in Indiana, and allege that said cross-ties in their natural state were purchased by the plaintiff from farmers and other producers of such
16 cross-ties located within the State of Indiana and that such raw or untreated cross-ties were sold by the plaintiff to the Baltimore and Ohio Railroad Company and to other railroad companies and that same were delivered by the producer to the plaintiff upon the right-of-way of the particular railroad company to which the cross-ties had been sold in the State of Indiana and that after the same were inspected and graded by agents of the plaintiff and by agents of the respective railroad companies, the agent of the railroad company to whom such untreated cross-ties had been sold accepted the ties on behalf of the railroad company in the State of Indiana and on the right-of-way of the said railroad company's

right-of-way in the State of Indiana; and defendants allege further that the plaintiff was not obliged by virtue of its contract of sale with the several railroad companies to deliver said cross-ties to any other point and was not obliged to deliver the untreated cross-ties across any state line to the railroad company purchasing such cross-ties.

5(b). With reference to so much of the allegations of paragraph "5" of the plaintiff's complaint either admitted or denied in this paragraph (i. e. 5 (b)) of defendants' "Answer", the defendants specifically deny that the facts alleged in paragraph "5" of the plaintiff's complaint and here answered were a "course of transactions" (or any part thereof) giving rise to the receipts by reason of which the gross income taxes for the annual taxing periods in question were assessed and the defendants deny that such facts are in any manner material to the accuracy, legality or constitutionality of such assessments.

Subject to the limitations stated the defendants admit so much of the paragraph designated "5" of the
17 plaintiff's complaint as alleges that after the cross-ties were delivered by the plaintiff to the railroad on the railroad company's right-of-way within the State of Indiana and after the acceptance by the railroad company of such delivery of the product sold, the respective railroad companies did, as already alleged herein, in some instances, place the raw or untreated cross-ties as the property of the railroad company on cars owned or controlled by the railroad company and that the railroad company did then transport such property to states other than the State of Indiana, and that a portion of the raw cross-ties were so transported by the respective railroad companies to a creosoting processing plant belonging to or under the control of the plaintiff located at Green Springs, West Virginia, which plant was allegedly leased by the railroad company to the plaintiff, and that the said raw and untreated cross-ties were then placed by the railroad company in the custody of the plaintiff for the sole purpose of permitting the plaintiff to subject the cross-ties to a creosoting treating process and that the said cross-ties were, after they had been subjected to this creosoting process, returned by the plaintiff to the physical custody, control and possession of the railroad at Green Springs, West Virginia, and were ultimately used by the railroad throughout the several states in which it operates, including the states of Indiana and of West Virginia; that a portion of the raw and untreated cross-ties sold and de-

livered to the railroad company and accepted by the railroad company along its right-of-way within the State of Indiana were, after such delivery and acceptance, placed upon the railroad cars controlled by the railroad company as the property of the railroad company and were carried by the railroad to a certain creosoting processing
18 plant located at Finney, Ohio, which plant was owned and operated by the National Lumber and Creosoting Company, which company is one of the plaintiff's subsidiary corporations, and such raw and untreated cross-ties were then placed by the railroad in the custody of the National Lumber and Creosoting Company for the sole purpose of being subjected to a treating process, that after such treating process was completed the cross-ties in their treated state were returned to the custody, control and possession of the railroad on the railroad company's right-of-way at Finney, Ohio, and that such treated cross-ties were ultimately used by the railroad throughout the several states in which it operates, including both the states of Indiana and Ohio; that the raw and untreated cross-ties were inspected at the point of delivery of such raw and untreated cross-ties within the State of Indiana by agents of the plaintiff and agents of the railroad and were accepted as of suitable grade and quality by the agents of the railroad, and further that copies of the inspection reports of the agents of the railroad were forwarded immediately to an office maintained by the plaintiff at Marietta, Ohio, pursuant to the directions of the plaintiff and that there was prepared in the office of the plaintiff at Marietta, Ohio, an invoice addressed to the railroad and sent to the principal accounting office of the railroad or to the address designated by the purchasing railroad and that duplicate copies of the invoices prepared by the plaintiff were forwarded to the principal office of the plaintiff maintained at Pittsburgh, Pennsylvania. But the defendants deny that the charge for such raw and untreated cross-ties reflected in said invoices were at unit prices for treated ties f. o. b. on cars at the
19 originating point and the defendants allege that the only receipts of the plaintiff by reason of which the gross income tax was assessed for the annual taxing periods in question was gross income received in payment for the sale and delivery by the plaintiff of raw and untreated cross-ties to the railroad.

Subject to the qualifications and restrictions heretofore set forth the defendants admit so much of paragraph "5"

of the plaintiff's complaint as alleges that the plaintiff required railroads to make all payments to the plaintiff by bank drafts drawn on Pittsburgh banks and that the payment was made by the railroad to the plaintiff at Pittsburgh, Pennsylvania, at the direction of the plaintiff; that the plaintiff voluntarily chose to carry on the major part of the bookkeeping transactions involved in the sale of raw and untreated cross-ties at Pittsburgh, Pennsylvania, but the defendants deny that the "plaintiff in none of the years in question * * kept no books in Indiana", and allege that some records were kept by plaintiff's agents in Indiana during the taxing periods in question; further the defendants deny the allegation that "plaintiff in none of the years in question had an office of any kind in the State of Indiana" and the defendants further allege that while the plaintiff may not have, during any of the annual taxing periods in question, maintained a formal office within the State of Indiana the plaintiff did have such offices within the state as were maintained by the duly authorized agents of the plaintiff in railroad cars or equipment placed on the sidings or along the right-of-way of various railroad companies within the State of Indiana which offices were railroad rolling equipment and were moved from place to place as the needs of the plaintiff's business required and that the plaintiff had within the state such offices as were maintained by the duly authorized agents of the plaintiff engaged in the purchase, inspection, grading, acceptance and delivery of raw and untreated cross-ties in hotels, automobiles, automobile trailers, all of which offices were never located at one point except temporarily, and as the needs of the plaintiff required; and the defendants further allege that the agents of the plaintiff within the State of Indiana during the taxing periods mentioned were, to a limited or qualified degree, fiscal agents of the plaintiff but that the exact scope of the agent's authority in fiscal matters and the exact degree of the limitations or restrictions placed upon such agents by the plaintiff is presently not known to the defendants, and the defendants further allege that the offices so maintained or had within the State of Indiana by the authorized agents of the plaintiff were limited and qualified fiscal offices of the plaintiff but that the exact degree of such limitations and qualifications of such offices and the agents thereof is not known to the defendants.

Subject to the qualifications heretofore set forth the defendants admit so much of paragraph "5" of the plain-

tiff's complaint as alleges that all payments to the plaintiff were made by bank drafts drawn on Pittsburgh banks, but the defendants allege that the plaintiff by specifically directing those who purchased cross-ties from it to do so required the purchasers to make payment to it at Pittsburgh, Pennsylvania, but that such receipts all arose out of business done by the plaintiff in Indiana.

21 Subject to the qualifications heretofore set forth the defendants admit so much of paragraph "5" of the plaintiff's complaint as alleges that the plaintiff deposited the funds received as payment from the respective railroad companies for raw and untreated cross-ties in banks located in Pittsburgh, Pennsylvania; but the defendants allege that during each of the annual taxing periods in question the plaintiff was engaged in doing business within the State of Indiana and that the plaintiff acting through the instrumentality of its duly authorized agents within the State of Indiana transacted all the business of the plaintiff relative to the acquisition, purchasing, inspecting, accepting, grading, approving, paying for, and delivery of the raw and untreated cross-ties to the purchasers of such cross-ties from the plaintiff; and the defendants further allege that during the major portion of the annual taxing period of 1935, and throughout the entire annual taxing period of 1936, and continuously to this date, the plaintiff had, as a foreign corporation, qualified to do business in the State of Indiana having so qualified and having been admitted to do business in the State of Indiana on March 18, 1935, as is fully disclosed by the records in the office of the Secretary of State of the State of Indiana; and the defendants further allege that all of the receipts used as a measure of the gross income taxes assessed against the plaintiff for each of the annual taxing periods specified in the complaint were derived from business or activities conducted within the State of Indiana and not otherwise, and that the taxes assessed were measured by the gross income of the plaintiff derived from the sale of raw or untreated cross-ties which cross-ties
22 were both acquired by the plaintiff and delivered to the purchaser within the State of Indiana.

6. The defendants deny so much of paragraph "6" of the bill of complaint as alleges that the plaintiff has been improperly charged with the tax referred to in the complaint and is entitled to recover such an amount. The defendants further deny the allegation that the receipts from the transactions described in the plaintiff's com-

plaint, upon which the gross income tax for the annual taxing periods in question was based, are receipts derived from a business conducted in commerce between the State of Indiana and other states of the United States, and which under the terms and provisions of Section 6 A of the Gross Income Tax Act of Indiana is exempt from taxation; and the defendants further deny the allegation that if the receipts derived from the sale of untreated cross-ties as described in the plaintiff's complaint are not exempt under the provisions of Section 6 A of the Indiana Gross Income Tax Act, then said Act in invalid and void and the assessment of taxes thereunder illegal as to the tax assessed on the receipts of the plaintiff derived from the sale of untreated cross-ties for the reason that the said tax so assessed constitutes a regulation of and a burden upon commerce between the State of Indiana and other states of the United States and is in conflict with Article I, Section 8, of the Constitution of the United States; and the defendants further deny that the plaintiff's receipts which formed the measure of the gross income tax assessed against the plaintiff and which the plaintiff now seeks to recover are proceeds from such transactions as are not properly taxable under the provisions of the Indiana Gross Income Tax Act and do not constitute receipts subject to the provisions and terms of the aforesaid Indiana
23 Gross Income Tax Act, and the defendants now affirmatively assert and allege that the receipts in question were derived from activities and businesses within the State of Indiana and hence that such income is derived from a source within the State of Indina and is properly taxable under and by virtue of the provisions and terms of the Indiana Gross Income Tax Act; and the defendants further deny that if the Indiana Gross Income Tax Act be construed to permit the State of Indiana to tax the plaintiff measured by the gross receipts derived from the sale of untreated cross-ties within the State of Indiana, that said act is illegal and void for the reason that it is in conflict with the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of property without due process of law; and the defendants do now specifically deny each allegation made by the plaintiff in the paragraph designated as "6" in the plaintiff's bill of complaint.

7. The defendants as a further answer to the plaintiff's complaint say that as to any allegation or averment contained therein not either admitted or denied heretofore

in this Answer that the defendants now specifically deny each and all such allegations and averments.

8. Wherefore the defendants pray for judgment in their favor, for their costs, and for all other proper relief.

Omer Stokes Jackson,
Omer Stokes Jackson,
The Attorney General,
Joseph W. Hutchison,
Joseph W. Hutchison,
Deputy Attorney General,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for the Defendants.

219 State House,
Indianapolis, Indiana.

24 And afterwards to wit at the November Term of said Court, on the 7th day of January, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

It is ordered by the Court that the above entitled cause be and the same is hereby assigned for trial Wednesday, February 1, 1939, at 10:00 A. M.

25 And afterwards to wit at the November Term of said Court, on the 25th day of January, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Upon request of plaintiff, it is ordered by the Court that this cause be, and the same is, hereby reassigned for trial on Wednesday, March 1, 1939, at 11:00 A. M.

26 And afterwards to wit at the November Term of said Court, on the 24th day of February, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

By agreement of parties, the assignment for trial on Wednesday, March 1, 1939, is hereby vacated and this case is hereby reassigned for trial on Friday, March 31, 1939, at 10:00 o'clock A. M.

27 And afterwards to wit at the November Term of said Court, on the 30th day of March, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

By agreement of parties, it is ordered by the Court that the above entitled cause be and the same is hereby reassigned for trial, Monday, April 24, 1939, at 10:00 A. M.

28 And afterwards to wit at the November Term of said Court, on the 24th day of April, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the parties by their respective attorneys, and the plaintiff files motion for leave to amend complaint, which motion is as follows:

29 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Apr. 24, 1939.

(Caption—8)

MOTION FOR LEAVE TO AMEND COMPLAINT.

Comes now the plaintiff in the above entitled cause and moves the Court for leave to amend its complaint heretofore filed in the above cause in the following particulars:

(1) To strike out the first three sentences in the first literal paragraph on page 3, which is a part of paragraph numbered 5 of the complaint, beginning with the words "The receipts of" and ending with the words "in which it operates", in lines 1 to 20, and substitute therefor the following:

"The receipts of the plaintiff were from the B. & O. Railroad Company (hereinafter referred to as the "Railroad"), received as payment for untreated cross-ties delivered on cars of the Railroad. The ties so delivered were inspected along the right-of-way of the Railroad in the State of Indiana by agents of the plaintiff and Railroad, and were delivered by Indiana producers f. o. b. cars of the Railroad, pursuant to the terms and conditions of a certain contract between the Railroad and the plaintiff. Pursuant to an understanding with the Railroad, all of the raw cross-ties so delivered were immediately carried by the Railroad to a

creosoting plant at Finney, Ohio owned and operated by National Lumber & Creosoting Company, one of plaintiff's subsidiary corporations, and were there subjected to a treating process and re-delivered to the Railroad at Finney, Ohio, and ultimately used by the Railroad throughout the several States in which it operates."

(2) By striking out the word "treated", where the same appears in paragraph number 5 of the complaint on page 3, in the next to the last line, and substituting therefor the word "untreated".

(3) By striking out the last sentence in paragraph number 5, beginning at the bottom of page 3 of the complaint and ending in the second line on page 4 of the complaint, and substituting therefor the following:

"All payments to the plaintiff were made by bank checks drawn by the Railroad on banks outside of the State of Indiana for such invoices, and deposited by plaintiff in banks in Pittsburgh."

(4) By striking out the word "Pittsburgh", appearing in the last line in paragraph number 5, being the sixth line on page 4, and substituting therefor the words "Marietta, Ohio".

(signed) Frederick E. Matson,
(signed) Harry T. Ice,
Attorneys for the Plaintiff.

Matson Ross McCord & Clifford
951 Consolidated Building,
Indianapolis, Indiana,
Of Counsel.

On this 28th day of February, 1939, the defendants in the above entitled cause, and each of them, hereby consent to the amendment of the complaint in accordance with the foregoing motion.

(signed) Omer Stokes Jackson,
Attorney General.
(signed) Joseph W. Hutchinson,
Deputy Attorney General.
(signed) Joseph P. McNamara,
Deputy Attorney General.

219 State House,
Indianapolis, Indiana

31 (Entry continued for April 24, 1939.)

And the Court being duly advised sustains said motion, and the plaintiff's complaint is amended in accordance with said motion.

And the defendants now refile their answer as an answer to the complaint as amended.

And this cause is now submitted to the Court for trial, and the parties file stipulation of facts, which is as follows: (H. I.)

Additional evidence is heard, and the plaintiff is given to and including May 10, 1939, and the defendants are given to and including May 25, 1939, within which to submit tentative draft of special findings of fact and file brief, and the plaintiff is given to and including June 1, 1939, within which to file reply brief.

It is ordered by the Court that this cause be and the same is hereby assigned for oral argument, Monday, June 5, 1939, at 9:30 A. M.

32 And afterwards to wit at the May Term of said Court, on the 22nd day of May, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Business of the Court requiring, it is ordered by the Court that the assignment of this cause for oral argument on June 5, 1939, be and the same is hereby vacated and set aside.

It is further ordered by the Court that this cause be and the same is hereby reassigned for oral argument on Friday, June 16, 1939, at 10:00 A. M.

33 And afterwards to wit at the May Term of said Court, on the 12th day of July, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

This cause coming on now to be finally heard by the court, and the parties appearing by their respective attorneys, and the court having heard the evidence and the argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure,

signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the court filed and made a part of the record in this cause, all of which is now done.

34 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—8)

Filed July 12, 1939.

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Pursuant to Rule 52, the court now states its Special Findings of Fact, hereby adopting the "Stipulation of Facts" filed by the parties herein as its Special Findings of Fact, as follows:

Filed July 12, 1939.

35 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—8)

STIPULATION OF FACTS.

It Is Stipulated and Agreed between the parties hereto, that without prejudice to the right of either party to introduce additional evidence not inconsistent herewith or to object to any of the facts as irrelevant or immaterial, the following facts shall be considered in evidence herein as true:

1. Plaintiff, The Wood Preserving Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at Pittsburgh in the State of Pennsylvania. Plaintiff is qualified to do business in the State of Indiana, but has no agents or employees within the State except as hereinafter specified, and maintains an agent in the City of Indianapolis, Indiana for the service of process. Plaintiff is engaged in the business of treating ties and timbers by creosoting and other preserving processes, and engages in the business of producing, purchasing and selling ties and timbers.

36 It does not, however, sell ties or timbers to any one other than to those with whom it has a contract to

treat such ties or timbers, nor does it produce or purchase ties or timbers for sale to any one other than to persons or corporations with whom it has a contract to treat the ties or timbers, and does treat the ties and timbers so produced and purchased.

2. Defendant, Department of Treasury of the State of Indiana, is an executive Department of the State of Indiana vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chapter 50, Indiana Acts of 1933), as amended by Acts of 1937 (Chapter 117, Indiana Acts of 1937). Defendants, M. Clifford Townsend, Peter F. Hein and Lawrence F. Sullivan, are each citizens and residents of the State of Indiana, County of Marion, and together constitute the Board of Department of Treasury of the State of Indiana.

3. The matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3,000.00).

4. On August 6, 1937, there was assessed against the plaintiff a gross income tax, together with interest, for the year 1934 in the amount of Two Thousand Four Hundred Forty-Four Dollars and Seventy-nine Cents ($2,444.79), and for the year 1935 in the amount of One Thousand Eight Hundred Seventy-six Dollars and Forty-one Cents ($1,876.41), and for the year 1936 in the amount of Two Thousand One Hundred Twenty-one Dollars and Twenty-seven Cents ($2,121.27), making a total assessment of Six Thousand Four Hundred Forty-two Dollars and Forty-
37 seven Cents ($6,442.47).

5. Thereafter, and on or about October 21, 1937, and within the time fixed by the provisions of the aforesaid Act and amendments, and upon forms prescribed by the Department of Treasury, plaintiff filed separate claims for the correction of the amount of tax paid and for a refund of the tax and interest so paid as aforesaid with the Department of Treasury, Gross Income Tax Division. Accompanying said statement for correction of the amount of tax and refund of the tax, and incorporated as a part thereof, was a petition for refund of the tax in which there was set forth at length the grounds of plaintiff's objections to the additional tax assessed.

6. After a hearing before the Gross Income Tax Division, and on the 18th day of August, 1938, the plaintiff, through the Department of Treasury, Gross Income Tax Division, was advised that plaintiff's claim for correction

of the amount of tax and refund of the tax, together with interest, paid for each of the years, was disallowed and the refund denied. Defendants have refused to pay to the plaintiff any portion or all of the tax and interest so paid for each of the aforesaid years.

7. Thereafter and within the time allowed by law, plaintiff brought this action to recover the tax and interest previously paid. Plaintiff has taken all the steps required by law to be taken before filing of this suit for refund.

8. The receipts in each of the years, upon which the tax sought to be recovered was assessed, arose out of the following course of business:

(a) On October 1, 1932, the Baltimore & Ohio Rail-
88 road Company, a corporation organized under the laws of the State of Maryland, with general offices at Baltimore, Maryland, and hereinafter called "the Railroad Company", was the owner of a tie and timber treating plant at Green Spring, West Virginia. At that time, and at all times herein involved, the Railroad Company had various lines extending through the State of Indiana. On that date, it leased the treating plant to, and entered into a contract for certain other services with, the Joyce-Watkins Company, which contract and lease is in the words and figures as follows, to-wit:

89 This Agreement made this 1st day of October, 1932, between The Baltimore & Ohio Railroad Company, hereinafter called "Railroad", and the Joyce-Watkins Company, hereinafter called "Contractor",

Witnesseth:

The treating capacity of the tie treating plant of the Railroad at Green Spring, West Virginia, which is approximately 6,000,000 cubic feet of timber per year, is in excess of that needed for requirements of the Railroad in territory which can economically be served from the Green Spring plant.

The Contractor agrees to operate the plant, treating such ties and timber as the Railroad may require and in addition the Contractor will endeavor to develop commercial business to the extent of the capacity of the plant not required by the Railroad.

The Contractor agrees to yard, store, season, handle and treat all the requirements of the Railroad, including bridge and switch ties and other timber, that are within an economical radius of distribution from Green Spring plant.

The Railroad agrees to deliver to the Contractor on cars at the Treating plant the ties and other forest products which it desires to have treated.

The Railroad agrees not to build other plants or contract with other plants for treating ties or timber for use in the territory that has normally been served by the Green Spring plant.

In the operation of the plant the Contractor will give preference to the requirements of the Railroad, and will be governed by the Railroad's specifications in all operations for their account. The treatment of commercial business will be scheduled so as not to interfere with the Railroad's requirements.

40 The Contractor will furnish all operating supplies and all labor necessary for operating the plant, storage yards, tracts and equipment.

The Railroad will, at its expense, keep in proper repair the standard gauge locomotives and cars used in intra-plant service. The Contractor will pay the Railroad each year for the cost of that proportion of such repairs as is represented by the percent of commercial treatment to the total treatment for the year. The Contractor will furnish all labor and material for the maintenance of plant and equipment and furnish all labor for the yard tract maintenance. The Railroad will furnish all materials for the maintenance of the yard tracks.

The Railroad will make replacements of complete units of the plant machinery and equipment as required by ordinary wear and tear when the condition of such machinery and equipment becomes such that it can no longer be maintained by repairs or replacements of parts.

The Contractor will make all additions to the plant and equipment required for their commercial business, and the Railroad will make all additions to the plant and equipment required to meet its needs.

The Railroad will purchase and deliver to the plant all the preservatives used for the treatment of ties and timber for its own use. The Contractor will unload and store these preservatives pending use.

The Contractor will purchase the preservatives for use in treatment of their commercial business.

The Railroad will purchase and deliver the coal and fuel oil needed for the operation of the plant. The Contractor will pay the Railroad each month for the cost of that portion of the coal and fuel oil used in the handling and treatment of the ties and timber they sell

41 commercially. The price will be f. o. b. Green Spring plant, the Contractor paying commercial rate of freight.

The Railroad will pay the taxes and insurance on the plant, and the Railroad's stock of ties and timber and preservatives and other materials.

The Contractor will pay the expense of compensation insurance on the labor employed by it.

The Contractor will operate the water pumping and water treating plant for engine supply, and will furnish compressed air and electric current for the interlocking plant and for lighting purposes in and around the station to the extent of the capacity of the present facilities, for which service payment is provided in the attached schedules. (Exhibit D).

The wood working mill, located on the treating plant grounds, will be operated by the Railroad, and any work done by the Railroad for the Contractor at this mill will be paid for as provided in the attached schedules. (Exhibit C).

An estimate of the quantity of material to be treated will be made by the Railroad and given to the Contractor, at the beginning of each year in order that the proper scale of prices as contained in the attached schedules may be applied to the work performed. In the final month of the year when the exact quantities become definitely known, any variation in prices due to the actual quantities will be adjusted on the final invoices for the last month of the year.

All the work done for the Railroad by the Contractor at the plant, and all work done by the Railroad for the Contractor at the wood working mill, and all coal and fuel oil furnished by the Railroad on account of the Contractor's commercial business will be invoiced each
42 month and these invoices will be paid fifteen (15) days after the receipt of the invoice.

For all work done for the Railroad by the Contractor under this contract the following schedule of prices will be paid:

Exhibit A—Treating Plant Prices.
" B—Storage Yard Prices.
" C—Wood Working Mill Charges.
" D—Cumberland Division Charges.
" E—Rates of Pay as of January 1, 1932.
Statement of method to be used in computing prices to conform to any changes in the rates of pay.

The prices given in these schedules are based on the rates of pay for labor as paid by the Railroad as of January 1, 1932, less than 10 per cent reduction that was made February 1, 1932. It is agreed that if any increases or further reductions are made in these rates of pay, corresponding increases or reductions will be made by the Contractor in the prices given in the attached schedules for work done by it for the Railroad. The rates of pay as of January 1, 1932, and a statement of the method to be used in computing prices to conform to changes in the rates of pay are given in Exhibit "E", attached hereto.

For the use of the plant and equipment in treating their commercial business the Contractor will pay the Railroad ..... per cubic foot of commercial timber treated.

At the expiration of the contract, the Contractor will return the plant and equipment back to the Railroad in the same condition as when received ordinary wear and tear and damage by the elements excepted.

The Contractor agrees to employ and use in the operation of the plant, insofar as its labor requirements
43 go, the employes heretofore employed at the plant by the Railroad at the wages paid by the Railroad unless otherwise agreed, subject, however, to any wage changes hereafter made in the Railroad wage scale, except in such individual instances where such employes may prove to be incompetent or otherwise unsatisfactory, and to cooperate fully with the Railroad in protecting the employes at the plant, many of whom are members of the Baltimore and Ohio Relief Department, with loans from said Department. Notwithstanding this provision, however, the employes collectively and individually on and after the effective date of this agreement will be and become employes of the Contractor, which will be responsible for all personal injuries received during and in the scope of such employment by the Contractor.

Ties in this agreement are understood to mean standard gauge railroad cross ties, unless otherwise indicated.

The Contractor agrees to sell to the Railroad all ties produced or purchased by it originating in territory from which ties in the usual course of business would be brought to the lines of the Railroad to the extent that the Railroad may give orders to the Contractor for the purchase of such ties.

"Right-of-way" territory is understood to mean that

territory from which timber is physically adjacent to the tracks of the Railroad where delivery of the ties is accomplished by teams, trucks or other means of transportation, except other railroads.

The Purchasing Agent of the Railroad shall advise the Contractor from time to time in writing of the quantities and kinds of ties which the Railroad will need and the time within which it desires the ties to be delivered, and the price which the Railroad is willing to pay the Contractor f. o. b. cars on the Railroad's tracks. The Contractor will produce or purchase from other producers
44 the ties so ordered, and sell and deliver the same to the Railroad as ordered to the extent that said ties may reasonably be produced or purchased from said territory.

If the Contractor is unwilling (and so notifies the Railroad in writing within thirty days after notification of quantity and price by the Purchasing Agent) to furnish ties to the extent that same reasonably may be produced in said territory in accordance with the price, terms and conditions of the written advice from the Purchasing Agent covering same, then this entire contract may be terminated on thirty days' written notice given by either party, and, upon the termination of such notice, the Contractor will surrender the treating plant subject to all the provisions of this contract in respect of termination upon the expiration of this agreement.

The Contractor agrees that it will not ship any ties originating in the said territory to others without permission of said Purchasing Agent.

The Railroad, being interested in certain operations in Hardy, Hampshire, Pendleton and Grant Counties, West Virginia, this contract shall not apply to those counties, and the Contractor agrees that it will not extend its operations into those counties without the consent of the Railroad.

This contract shall not limit the right of the Railroad to purchase ties produced in territory adjacent to its lines or elsewhere from others, nor require the Railroad to order ties from the Contractor except to the extent that it may see proper to do so.

The Contractor further agrees that its price to tie producers will not be more than _____ cents per tie under the price paid to it by the Railroad exclusive of load-
45 ing charge, and that the _____ cents margin or spread shall apply only in cases where cash is paid

to the producer by the Contractor when ties are delivered on the Railroad's right-of-way, and that if ties are not paid for in cash by said Contractor and are inspected by the Railroad and payment made by it in advance to the Contractor, then the latter's margin or spread on such ties shall not exceed _____ cents per tie.

All ties will be inspected by the Railroad's inspectors, as loaded into cars at the point of origin.

The Contractor shall invoice the ties promptly after inspection and acceptance by the Railroad inspectors. The Railroad will voucher and pay each week for all the ties covered by the necessary invoices and inspection reports.

The Railroad reserves the right to maintain and use the laboratory now located in the southwest corner of the main building for testing preservatives and experimentation.

If, in the event of the termination of this contract, the Contractor then has commercial orders and stock on hand at the Green Spring plant, the Railroad agrees it will permit the treatment of such orders on the same basis of cost as in this contract, provided such material must be treated within one year from the termination of the contract.

The Railroad will furnish such free transportation to employes of the Contractor engaged in service in connection with this contract to such extent as the proper officers of the Railroad may determine and as may be permitted by law.

This contract shall become effective on March 1, 1933, and shall continue for five (5) years from March 1,
46 1933, unless terminated as hereinbefore provided.

In Witness Whereof the Railroad has caused this agreement to be signed by its Vice-President, and the Contractor has caused this agreement to be signed by its Vice-president.

The Baltimore and Ohio Railroad Company,
By (Signed) C. W. Galloway,
Vice-President.

The Joyce-Watkins Company,
By (Signed) W. W. Watkins,
Vice-President.

For and in consideration of the sum of One Dollar ($1.00) and other goods and valuable consideration, Joyce-Watkins Company, an Illinois corporation, does

hereby assign to The Wood Preserving Corporation, a Delaware corporation, all of its right, title and interest in and to a certain agreement dated the 1st day of October, 1932, between The Baltimore and Ohio Railroad Company and Joyce-Watkins Company, said agreement being an agreement providing, among other things, for the operation by Joyce-Watkins Company of the tie-treating plant of said The Baltimore & Ohio Railroad Company located at Green Spring, West Virginia.

Dated this 3rd day of May, 1933.

Joyce-Watkins Company,
(Signed) By W. W. Watkins,
President.

Attest:
(Signed) F. W. Werner,
Secretary.

The Wood Preserving Corporation, a Delaware corporation, does hereby accept the assignment of the above mentioned contract dated October 1, 1932, between The Baltimore & Ohio Railroad Company and Joyce-Watkins Company, and hereby agrees to fully carry out the
47 terms of said contract.

Dated this 3rd day of May, 1933.

The Wood Preserving Corporation,
(Signed) By Grant B. Shipley,
President.

Attest:
(Signed) David M. Gilmore,
Secretary.

The Baltimore & Ohio Railroad Company does hereby consent and agree to the assignment and transfer from Joyce-Watkins Company, an Illinois corporation, to The Wood Preserving Corporation, a Delaware Corporation, of the above mentioned contract dated October 1, 1932, between The Baltimore & Ohio Railroad Company and Joyce-Watkins Company.

Dated this 3rd day of May, 1933.

The Baltimore & Ohio Railroad Company,
(Signed) By C. W. Galloway,
Vice-President.

Attest:
(Signed) G. F. May,
Secretary.

Attached to the aforesaid agreement are Exhibits A to E, inclusive, referred to in said agreement, which are eliminated for the reason that they relate to prices for treatment, storage, wood work, charges and rates of pay, all of which are conducted under the contract at Green Spring, West Virginia, and in no way relate to receipts of the plaintiff which were taxed by defendants in this case.

The price per cubic foot for treatment of commercial timber and the margin on ties is also omitted from the aforesaid agreement for the reason that it in no way relates to the receipts of the plaintiff which were taxed by the defendants in this case.

(b) On May 3, 1933, by an instrument between
48 plaintiff, The Wood Preserving Corporation, and Joyce-Watkins Company, the aforesaid contract was assigned to the plaintiff, and since said date and during all the times herein involved, plaintiff and the Railroad Company have carried out the provisions of the aforesaid contract so assigned, and all ties supplied to the Railroad Company have been supplied under that contract.

(c) On December 21, 1922, the Central Creosoting Company, a corporation organized under the laws of Delaware, owned and operated a tie and timber treating plant at Finney, Ohio, and on that date entered into a contract with the Baltimore & Ohio Railroad Company to treat ties of the Railroad Company, which contract is as follows, to wit:

49 This Agreement, made and entered into this 21st day of December 1922, by and between the Central Creosoting Company, a corporation organized and existing under the laws of the State of Delaware with General Offices located at Chicago, Illinois, hereinafter called the Contractor, party of the first part, and the Baltimore & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Maryland, hereinafter called the Railroad, party of the second part, Witnesseth:

Whereas, the Railroad desires to contract for the preservative treatment of railroad cross ties for use on certain of its line of railroad, and

Whereas, the Contractor has the plant and equipment necessary to properly treat cross ties in the manner, to the extent, for the period, upon the compensation, and subject to the conditions as hereinafter set forth,

Now, Therefore, in consideration of the promises and the mutual covenants and agreements of the respective parties herein contained, and of the sum of One Dollar ($1.00) paid by the Contractor to the Railroad, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

Section 1. The Contractor represents and states it is duly and legally incorporated under the laws of the State of Delaware, that it has full corporate power to operate a timber-preserving plant within the State of Ohio, and that it has the right to use the treating processes herein prescribed, and to exercise and enjoy in connection therewith all patents, rights, or privileges necessary for the full performance of this agreement without hindrance from anyone, having or claiming to have patents or rights covering or relating to the treating processes prescribed herein.

Section 2. The Railroad agrees to deliver annually
50 to the plant of the Contractor at Finney, Ohio, for treatment during the life of this contract, not less than Six Hundred Thousand (600,000) cross ties; or more than One Million (1,000,000) cross ties; it being understood that should the Railroad elect to deliver for treatment more than Six Hundred Thousand (600,000) cross ties in any one calendar year, it will give the Contractor in writing on or before October 1st of the year preceding that in which the ties are to be treated, notice of such intention. It is mutually agreed, however, that should the Railroad at any time desire to increase the specified quantity of cross ties to be treated, it may avail itself of any part of the capacity of the treating plant which has not then been otherwise contracted. It is further agreed that during the life of this contract the Railroad will not contract with any other than the Contractor for the treatment during any year thereof of cross ties for use on its lines before offering to the Contractor for privilege of treating cross ties in excess of the minimum of Six Hundred Thousand (600,000) cross ties to the extent of the available capacity of the treating plant for that year, but not in excess of the maximum of One Million (1,000,000) cross ties herein provided. Nothing, however, in this provision is to interfere with the Railroad treating at its own plant as Green Springs, West Virginia, ties for use on any of its line.

In the event the Contractor is unable to provide piling space for ties in sufficient quantity to permit thorough

seasoning to take care of the maximum quantity desired by the Railroad, the Railroad reserves the right to contract for the treatment of such ties at other plants, as a matter of protection in providing the necessary number of ties to be used for the year.

Section 3. The Railroad agrees to deliver the cross
51 ties to be treated to the Contractor f. o. b. cars at its plant in such quantities and at such intervals as will provide cross ties sufficiently seasoned to operate the plant of the Contractor on or after January 1st, 1923, at the minimum capacity contracted for in Section 2, provided the Contractor is in position to receive the desired number of ties as offered by the Railroad.

Section 4. The Contractor agrees to receive said cross ties at its plant, to unload such as may require additional seasoning and pile them in its yard in the manner prescribed by the representative of the Railroad, allowing them to remain so piled until properly air-seasoned for treatment. The Railroad agrees to pay the Contractor for unloading and piling unseasoned cross ties the rates provided for in Section 17.

Section 5. The Railroad agrees that in loading cross ties for shipment to plant of the Contractor, it will, in so far as practicable, separate the cross ties in the cars or load them into separate cars in the following manner:

A. White Oak Ties.

B. As hardwood cross ties, Red Oaks, beech, hard maple, locusts, elm, hickory and ash.

C. As softwood cross ties—Soft maple, birch, hackberry and gum.

D. As pines—Yellow pine and cypress.

The Contractor agrees that in unloading and storing in its yard the cross ties delivered to it by the Railroad, the said assortment shall be maintained and that each stack shall have painted upon it the initial, number, grade and outturn of each car from which the cross ties are unloaded and the date of unloading.

Section 6. In the event that the Railroad does
52 not succeed in affecting the separation of cross ties as provided for in Section 5, at the time of loading said cross ties into cars, the Contractor agrees that upon receipt of carloads of cross ties which have not been so separated, it will separate the cross ties into classes at the time of unloading or at the time of treating.

The Railroad agrees in such event to provide an authorized representative to classify such ties as they are

unloaded and treated, or, failing in this, the Contractor shall have the right to determine such classification, acting in such case as the authorized representative of the Railroad.

The Railroad agrees to pay the Contractor for labor in making the separation provided for in this paragraph the rates as provided in Section 17.

Section 7. The Contractor agrees to receive and unload without delay at its plant all ties or other material of the Railroad to the limit of yard and labor capacity, it being understood that the ties or other material shipped by the Railroad will at all times receive preference in handling.

Section 8. When cross-ties shipped by the Railroad have become sufficiently air-seasoned to permit of satisfactory treatment, they are to be treated by the Contractor by any standard process of treatment approved by the American Wood-Preservers' Association, which the Railroad may designate.

Section 9. The Contractor agrees that the piling of cross-ties in its storage yard shall be subject to direction of a representative of the Railroad, that the representative of the Railroad may inspect at the plant of the Contractor all cross-ties, both before and after treat-
53 ment; that the representative of the Railroad shall have full access at all times to all details in connection with the treatment of ties for the Railroad, shall determine when ties are properly seasoned, that the process of treating and ingredients used in connection therewith shall be subject to his inspection and supervision, shall be permitted to examine and test all solutions and ingredients received at the plant of the Contractor to be used in treatment of cross ties for the Railroad and shall be permitted to take such samples of any and all such solutions and ingredients as may be required by the Railroad for test.

Section 10. The Contractor agrees that the Engineer's or Superintendent's records of the details of the operation of the plant, while engaged in the treatment of cross-ties for the Railroad, shall be kept in the form prescribed by the representative of the Railroad upon form supplied by the Railroad and that copies of the records shall be supplied to such officials of the Railroad as may from time to time be designated by the Railroad.

Section 11 The Contractor agrees that on the completion of the treatment of the cross-ties in accordance with the specifications provided for in Section 8, and after their

acceptance by the representative of the Railroad, it will, with its own forces, load the cross ties in cars at its plant, maintaining the following separations:

Grades 1 and 2 of either Class A, Class B, Class C or Class D;

Grades 3 of either Class A, Class B, Class C or Class D;

Grades 4 and 5 of either Class A, Class B, Class C or Class D.

and consign them to the Railroad at such points and in care of such representatives of the Railroad as may be designated by the Railroad, mailing notice of the shipment of each carload, on forms prescribed by the
54 Railroad, to designated representatives.

The Railroad agrees to supply all strips, stakes, wire and other material necessary in loading the cross ties for shipment, and if supplied by the Contractor on request of the Railroad that the Railroad will pay the Contractor actual cost thereof delivered in place at the plant.

The Railroad agrees to supply sufficient cars to remove with reasonable promptness all treated cross ties as and when they are ready to be shipped, or in event it fails to do so or should elect to have cross-ties stored on the premises of the Contractor after treatment, then the Contractor agrees to stack the cross-ties on its premises to the satisfaction of the Railroad's representative and to consider the performance of this operation to be the same as if the cross ties had been loaded for shipment; provided, however, that the Contractor will not be called upon by the Railroad to hold in storage upon the Contractor's premises more than twenty per cent (20%) of the cross-ties treated in one year.

Section 12. The cost of loading into cars by the Contractor of any cross-ties, which, at the request of the Railroad, have been piled on the Contractor's premises for storage after treatment as provided for in Section 11, shall be paid to the Contractor by the Railroad at rate provided in Section 17.

Section 13. The Contractor agrees to apply "S" Irons to such cross ties of the Railroad as may be designated by the representative of the latter, and in the manner as prescribed by him.

The Contractor further agrees to obtain the necessary "S" Irons from the Railroad, and to apply them to the

designated cross ties for the rates provided in Section 17.

55 Section 14. The Contractor agrees that in the operation of its plant preference will be given to the treatment of cross ties which it is bound to treat each month for the Railroad under the terms of this agreement, and that it will not treat or agree to treat other material that might interfere with the delivery of the monthly allotment to the Railroad, without its written consent first obtained.

Section 15. The Contractor agrees to provide against the loss by fire of the cross ties of the Railroad, while the cross ties are on the Contractor's premises, by maintaining at its plant a large capacity fire pump and an overhead water storage tank connected with a system of water mains and fire hydrants located throughout the premises.

The Contractor further agrees to carry insurance to the amount of One Hundred and Twenty-five Thousand Dollars, ($125,000.00) to guard against damage or destruction by fire of ties or other material belonging to the Railroad while in possession of the Contractor. Policies for this insurance to be drawn jointly in favor of the Contractor and the Railroad. The Contractor agrees to furnish the Railroad with certificate of insurance for each policy issued.

Section 16. The Railroad agrees to pay the Contractor and the Contractor agrees to accept from the Railroad as compensation and settlement in full for the treatment of cross ties of the Railroad and for all services performed in connection with said treatment, except for unloading untreated ties for seasoning, handling, storing, ironing, applying loading material and loading treated ties from the yard to cars after treatment, covered by Sections 4, 6, 11, 12, and 13 of this agreement, in the manner, to the extent and according to the specifications hereinbefore prescribed, the following sum of _____ per cubic foot of timber, for the treatment of cross ties

56 accepted by or treated as directed by the Railroad's representative, plus the cost of the preservatives used in the treatment (if supplied by the Contractor) as determined by reading or working tank guages and checked by an inventory of preservatives taken at the end of each calendar month by a representative each of the Railroad and the Contractor, also plus any royalty charge that it is necessary for the Contractor to pay for the

privilege of using any patented treating process that the Railroad may designate.

Prices for the treatment and handling of cross ties are subject to change and adjustment, in the event conditions so warrant, by mutual agreement of the Railroad and the Contractor.

Section 17. The Railroad agrees to pay the Contractor and the Contractor agrees to accept from the Railroad as compensation and settlement in full for such handlings as may be necessary to fulfill this contract in addition to loading cross ties on trams for treatment and unloading cross ties from trams to cars or to stacks in yard after treatment, the following price:

For unloading and stacking cross ties in yard for seasoning, as required in Section 4, _____ per tie;

For each handling (other than loading on trams for treatment or unloading from tram to car or stacks in yard after treatment) necessary to separate cross ties as required by Section 6, _____ per tie;

For loading treated cross ties from ground into cars as required in Section 12, _____ per tie;

For applying "S" irons as required in Section 13, _____ per iron.

Section 18. The Railroad agrees to supply to the Contractor all preservatives necessary for the proper treatment of cross ties of the Railroad as herein specified and should the Railroad elect to have the Contractor furnish the preservatives, the Contractor agrees to make no purchase of such preservatives without first obtaining the written approval of the Railroad as to the price to be paid therefor.

57 The Contractor agrees to keep any preservatives supplied by the Railroad separate from other preservatives at its plant insofar as it is practicable with the present plant storage capacity, and to use it only in the treatment of material for the Railroad, and in the manner and quantity prescribed by the Railroad's representative at the plant of the Contractor.

Section 19. It is mutually agreed that in calculating the payments for treatment provided for in Section 16, the volume of each full cylinder load shall be Sixteen Hundred and Fifty (1650) cubic feet, regardless of the size of such ties; and any charge of less than full length shall be in proportion. The Contractor agrees to load each tram to its full capacity.

Section 20. The Contractor shall invoice the Railroad

on or before the tenth day of each month at the agreed price per cubic foot for the treatment of all cross ties and for all services rendered to the Railroad under this contract during the next preceding month, giving such information as may be required by the Railroad.

The Railroad agrees to pay the Contractor for the treatment of said cross ties on or before the thirtieth day of the month next succeeding that in which the said cross ties are treated.

Section 21. The Railroad agrees to do such switching of standard guage cars to and from the Contractor's plant as may be necessary to enable the Contractor to fulfill the requirements of the contract without charge therefor to the Contractor. The Contractor agrees to make request for only such switching as is reasonable, necessary and as nearly as practicable at times most convenient to the Railroad between the hours of 7:00 A. M. and 6:00 P. M.

Section 22. The Contractor agrees that its treating
58 plant shall be fully equipped for the handling and treating of switch ties, piling, timber, plank and paving blocks by the processes hereinbefore described and that it will accept from the Railroad and treat for it such material in such quantities and at such prices as may be from time to time agreed upon.

Section 23. This agreement is made to become effective upon the date of signature by both parties hereto and to remain in force for a period of five (5) years from that date, and to continue in effect thereafter subject to cancellation by either party upon six (6) months' notice given in writing to the other party to this agreement.

The period which shall be used to determine the number of cross ties treated shall be from January 1st to December 31st.

In Witness Whereof, the parties hereto have caused this agreement to be duly executed in duplicate the day and year first above written.

Central Creosoting Co.
By E. J. Stocking,
Its Vice President.

Witness:
H. B. Pigman.

The Baltimore and Ohio Railroad Co.
By W. S. Galloway,
Its Purchasing Agent.

S. M. Elder.

59 **SUPPLEMENT TO AGREEMENT OF DECEMBER 21, 1922, BETWEEN THE CENTRAL CREOSOTING COMPANY AND THE BALTIMORE AND OHIO RAILROAD COMPANY.**

The Central Creosoting Company desires to provide additional storage ground on which to pile for seasoning 300,000 additional cross ties, and to add further to the equipment to enlarge its operations.

In order to justify the additional expenditure, it is agreed to extend the time of the contract as herein after provided, upon condition that the Creosoting Company will provide the additional storage ground and increase its facilities so as to enlarge the output of the plant.

It Is, Therefore, Agreed this thirteenth day of February, 1924, that the agreement between the Central Creosoting Company and the Baltimore & Ohio Railroad Company of December 21, 1922, is amended as follows:

1. Section 23 of the original contract is amended so that the contract will extend to December 31, 1933, and thereafter until terminated by either party by giving six months' notice in writing, which notice may be given so as to terminate the contract on December 31, 1933, or on any day thereafter. This extension shall not be effective unless the Creosoting Company within one year from January 1, 1924, has increased its storage capacity by filling in the gravel pit at the plant at Finney, Ohio, sufficiently to provide additional storage ground on which to pile for seasoning 300,000 additional cross ties, and has added to its equipment so that it can operate its plant so as to treat the number of ties called for in Section 2 of the original contract. A lease of additional ground will be made to the Creosoting Company for the enlargement of the plant.

2. The last paragraph of Section 16 is amended to
60 read as follows:

Prices for the treatment and handling of cross ties are subject to change and adjustment to meet the increase or decrease of cost of labor and materials by mutual agreement between the Railroad Company and the contractor, and, if they cannot agree as to such changes, then the prices shall be submitted to arbitration, based upon the prices paid by the Railroad or by others for the same service and offers made by other treating plants for the same service.

3. All the terms of the original contract shall remain in effect as hereby modified.

Central Creosoting Company,
By J. T. Logan,
President.

The Baltimore & Ohio Railroad Company,
By W. S. Galloway,
Purchasing Agent.

61 Some time prior to the year 1933, the National Lumber & Creosoting Company, a Delaware corporation, became the corporate successor of Central Creosoting Company, and took over and assumed the aforesaid contract with the Baltimore & Ohio Railroad Company. After the National Lumber & Creosoting Company had succeeded to the rights of the Central Creosoting Company, and prior to the year 1933, the plaintiff, The Wood Preserving Corporation, acquired a majority of the capital stock of National Lumber & Creosoting Company, which was, throughout the years in question, controlled by plaintiff, The Wood Preserving Corporation. During the years in question, the provisions of the aforesaid contract with the Baltimore & Ohio Railroad Company were carried out and performed by plaintiff's subsidiary company, National Lumber & Creosoting Company.

(d) During the years in question, the following was the regular course of business: The Railroad Company, by telephone calls from its purchasing agent at Baltimore, Maryland, advised a representative of the plaintiff, at its office at Marietta, Ohio, of the ties to be required by it for a certain period in advance, and the price which it would be willing to pay. The oral communication of the order of the Railroad Company for ties under the Joyce-Watkins contract was acknowledged by agents of the plaintiff at Marietta, Ohio, and thereupon the plaintiff prepared and mailed to known producers of cross-ties in the State of Indiana and elsewhere, a price list stating the size, quality and kind of ties which it would accept at loading points along the right-of-way of the Baltimore & Ohio Railroad, and the prices which it would pay for such ties, as evidenced by a notice similar to the following:

62 Issue 11
July 9, 1937.

Cross Ties
The Wood Preserving Corporation
Marietta, Ohio

We are in the market at the present time for Cross Ties manufactured and cross piled as required by our specifications and subject to our inspection at acceptable loading points on The Baltimore and Ohio R. R. at prices for the sizes and kinds shown below:

All Ties 8½ Feet Long

Size	Group Ua Black Locust White Oaks Black Walnut	Group Tb Honey Locust Red Oaks	Group Tc Beech, Birches Cherry Hard Maples Hackberry
No. 1	.41	.41	.31
No. 2	.56	.56	.46
No. 3	.76	.76	.66
No. 4	.91	.91	.81
No. 5	1.01	1.01	.91

The above prices are on the ground and we pay additional for loading to cars.

Our inspectors make immediate payment by sight draft at time of inspection.

Ties delivered at points on the B. & O. right-of-way other than at acceptable switches or side tracks will not be accepted.

Ties of each group must be piled in separate piles.

The above prices are subject to change or withdrawal without notice.

When ties are piled at loading points on the B. & O. Railroad according to the above and our specifications, each pile should be marked with a tag on which is written "For The Wood Preserving Corporation" and the owner's name and address.

Correspondence regarding inspection may be addressed to our representative in your territory or to The Wood Preserving Corporation, Marietta, Ohio.

For copies of specifications or other information, address The Wood Preserving Corporation, Marietta, Ohio.

If you decide to produce ties for us, please advise, indicating your loading points.

This schedule does not apply to Hampshire, Grant, Hardy or Pendleton Counties, West Virginia, nor to the territory between Lexington, Virginia, and Harrisonburg, Virginia.

This price list cancels and takes the place of all previous issues.

Dimensions. All ties shall be eight (8) feet six (6) inches long.

All the shell measure is taken throughout both widths of the tie, from the middle of the tie.

Size	Sawed or Hewed Top, Bottom, and Sides	Sawed or Hewed Top and Bottom
1	8"	8"
2	8" × 6"	7" × 6"
3	8" × 6"	8" × 6" OR 7" × 6"
4	8" × 7"	8" × 7"
5	9" × 7"	9" × 7"

The lengths, thickness and widths specified are minima for the standard sizes. Ties over 8" longer, thicker or wider than the standard size ordered will be rejected.

All measurements of thickness and width will be made at both ends bearing surfaces between 20" and 24" from the middle of the tie, and the specified dimensions must be met throughout both these sections of the tie.

Right.—(2) feet six (6) inches.

The top of the tie is the plane farthest from the pith of the heart. Timber cut out the pith is present in the tie.

Before manufacturing ties, purchaser shall determine which species, or class will be accepted, and whether they are to be hewed or sawed and in other case whether on the sides as well as on the top and the bottom.

General Quality. All ties shall be free from any defects that may impair their strength or durability as wood ties, such as decay, large knots, large shakes, holes or unsound knots or knots, grain with slope greater than one in sixteen.

Manufacture. All ties shall be straight, well hewed or sawed, and exposed at the ends have bottom and top parallel, and have back uniformly removed.

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64 Holes. A large hole is one more than ½ inch in diameter and 3 inches deep within, or more than one-fourth the width of the surface on which it appears and 3 inches deep outside, the sections of the tie between 20 inches and 40 inches from its middle. Numerous holes are any number equaling a large hole in damaging effect. Such holes may be caused in manufacture or otherwise.

Knots. A large knot is one whose average diameter exceeds one-fourth the width of the surface on which it appears; but such a knot may be allowed if it occurs outside the sections of the tie between 20 inches and 40 inches from its middle. Numerous knots are any number equaling a large knot in damaging effect.

Shake. One which is not more than one-third the width of the tie will be allowed.

Split. One which is not over 5 inches long will be allowed, provided a satisfactory anti-splitting device has been properly applied.

Manufacture. A tie will be considered straight: (1) When a straight line along the top from the middle of one end to the middle of the other end is entirely within the tie; and (2) when a straight line along a side from the middle of one end to the middle of the other end is everywhere more than 2 inches from the top and the bottom of the tie.

A tie is not well hewed or sawed when its surfaces are cut into with score-marks more than ½ inch deep or when its surfaces are not even.

The top and bottom of a tie will be considered parallel if any difference in the thickness at the sides or ends does not exceed ½ inch.

Ties will be sized up by their smaller ends and sized down by their larger ends. The dimensions of the tie will not be averaged.

Each stack shall have fastened to it a tag on which is written, "for The Wood Preserving Corp." the owner's name and address, the date when stacked, and the number of ties of each kind of wood in the stack.

All ties are at the owner's risk until accepted. All rejected ties shall be removed within one month after inspection.

Ties delivered for inspection shall be stacked not less than 10 feet from the nearest rail of any track at suitable and convenient places; but not at public crossings, nor where they will interfere with the view of trainmen or of people approaching the railway. Ties shall be stacked in alternate layers of 2 and 7, the bottom layer to consist of

2 ties kept at least 6 inches above the ground. The next layer shall consist of 7 ties laid crosswise of the first layer. When the ties are rectangular, the two outside ties of the layers of seven and the layers of two shall be laid on their sides. The ties in layers of two shall be laid at the extreme ends of the ties in the layers of seven. No stacks may be more than 12 layers high, and there shall be 5 feet between stacks to facilitate inspection. Ties which have stood on their ends on the ground will be rejected.

Any acceptance of ties in variation with any of the above provisions shall not be construed or implied as a waiver by The Wood Preserving Corporation, to thereafter enforce the above requirements.

The Wood Preserving Corporation
102 Front Street—Marietta, Ohio
Our Representative in Your Territory is:

65 Producers having available supplies of ties, and being willing to furnish the ties at the prices stated in the price list, would notify by mail, wire or phone, the Marietta, Ohio office of the plaintiff of the quantity and type of ties and the loading point for such ties as the producer was willing to furnish under the price list, or plaintiff's agent would make such arrangement with producers in Indiana. All prices in the price list were for ties on the ground, but plaintiff customarily paid the producer an additional sum for loading the ties on to cars of the Railroad, and as a regular practice during the years here involved, the ties were loaded on to cars of the Railroad at the loading points by agents or employees of the producers furnishing ties. When the ties were ready at a loading point, an inspector of the plaintiff and of the Baltimore & Ohio Railroad Company would go to the loading point, and all ties accepted by the Railroad Company's inspector were loaded by the producer on cars of the Railroad. Ties rejected by the Railroad inspector were not loaded on cars or paid for by plaintiff. A shipping report is also made out by plaintiff's agent and one copy sent to plaintiff's Marietta office and one to the Finney treatment plant. All shipping reports were, as follows, excepting only for dates and descriptions of ties:

(H. I.)

66 The Wood Preserving Corporation

Office _____ Date 12-3, 1935.

Loaded at Vallonia, Ind. on St. Louis Div. B. & O. R. R.
Billed to B. & O. R. R. Care of E. Stimson.
At Finney, Ohio. Shipper Wood Pres. Corp.

Car Initial	Car No.	Kind	1	2	3	4	5	Total
B. & O.	171399	UA	27	19	10	6	8	70
		TA	6	7	16	17	36	82
		TC	2	3	20	53	132	210
		TL		2	6	2	16	26
								388

H. C. Osr, Foreman W. S. Shrive, Inspector.

67 Also at the end of each day, the Railroad inspector prepared an inspection report of the ties accepted, and furnished a copy of the report, in duplicate, to plaintiff's inspector. Upon the basis of this inspection report, plaintiff's inspector, by drafts on banks outside of the State of Indiana, settled with the producer for the ties accepted by the Railroad Company, as aforesaid. The amount of the drafts was predicated upon the price lists, plus the loading charges above referred to, if any. One copy of the Railroad's inspection report was sent forward to the Marietta, Ohio, office of the plaintiff, together with plaintiff's inspector's shipping reports and copy of the draft drawn to the producer. One copy of the shipping report, together with the billing of cars, was sent forward to the Finney, Ohio treatment plant and to the Baltimore, Maryland office of the Railroad Company. In the Marietta, Ohio office of the plaintiff, at the end of each week, the plaintiff prepared an invoice against the Railroad Company for ties inspected and reported during the previous week, as shown by the inspection reports, and forwarded the same to the Baltimore, Maryland office of the Railroad Company. The invoices so prepared and forwarded to the Baltimore office of the Railroad were as follows, except for description of cars and dates:

(H. I.)

68 WPC-82-S 50M 4-37 Invoice Copy Sales Dept.

The Wood Preserving Corporation
Ayer & Lord Division
Century Division
Carolina Wood Preserving Company
National Lumber & Creosoting Company

Customer's
Order No. & Date 7240-2/26/35 Invoice No. 422-8030
Requisition No. Invoice Date 8/24/37
Contract No. Our Order No. 422-622-99221
Shipped to B & O Railroad Co.,
c/o P. Petri, Chief Eng. M of W
Destination Finney, Ohio
The Baltimore & Ohio Railroad Co.,
Baltimore, Md.
M. S. R. Number
Terms:
Date Shipped From Indiana F. O. B. Point of
Car Initial & No. Freight Origin
How Shipped & Route B & O

Minimum Prices		Price Per Unit
Cross Ties as listed and supported by Inspection Reports as indicated.		
Car B & O 174596 Geo. D. Young Report #196) Car B & S 6467	400 Ta Ties	$ 357.90
Geo. D. Young Report #196) Car B & O 183493	263 Ta Ties	249.05
Geo. D. Young Report #196) Car B & O 180233	199 Tc Ties	180.75
Geo. D. Young Report #197) Car B & O 171477	400 Ta Ties	428.00
Geo. D. Young Report #197) Car C & A 17779	400 Ta Ties	431.00
Geo. D. Young Report #198) Car B & O 181046	416 Tc Ties	382.80
Geo. D. Young Report #199) Car B & O 178547	300 Tc Ties	298.30
Geo. D. Young Report #200) Car C & A 17776	408 Ua Ties	418.00
Geo. D. Young Report #201)	410 Ta Ties	405.50
	Amount	$3,151.30

69 At the end of each month, the Marietta office of the plaintiff mailed to the Pittsburgh, Pennsylvania office of the plaintiff distribution sheet showing all ties invoiced to the Railroad.

Payments to the plaintiff for the ties so furnished were made in the regular course of business by the Baltimore & Ohio Railroad by checks drawn on banks located in cities outside of the State of Indiana, mailed to the plaintiff at its Pittsburgh, Pennsylvania office, and deposited there. The receipts of the plaintiff from the ties so paid for in the manner aforesaid during the periods in question were as follows, and the tax and interest paid thereon and herein sought to be recovered were as follows:

For the period from January 1, 1934 To December 31, 1934	
Gross Receipts from ties produced in Indiana	$219,284.64
Less exemption	1,000.00
Amount subject to tax	$218,284.64
Amount of tax computed at the rate of 1%	2,182.85
Interest to date of payment assessed	261.94
Total tax and interest paid and herein sought to be recovered	$ 2,444.79
For the period from January 1, 1935 To December 31, 1935	
Gross Receipts from ties produced in Indiana	$168,536.65
Less Exemption	1,000.00
Amount subject to tax	167,536.65
Amount of tax computed at the rate of 1%	1,675.37
Interest to date of payment assessed	201.04
Total tax and interest paid and herein sought to be recovered	$ 1,876.41
For the period from January 1, 1936 to December 31, 1936	
Gross Receipts from ties produced in Indiana	$201,119.60
Less exemption	1,000.00
Amount subject to tax	$200,119.60
70 Amount of tax computed at the rate of 1%	$ 2,001.20
Interest to date of payment assessed	120.07
Total tax and interest paid and herein sought to be recovered	$ 2,121.27

9. All of the ties originating in Indiana during the years of 1934, 1935, and 1936 were delivered to the Railroad Company f. o. b. cars at points of origin within Indiana, were carried by the Railroad Company from the point of origin in Indiana to the Finney, Ohio treating plant, and there yarded, seasoned and treated pursuant to the Central Creosoting contract, and a separate charge, pursuant to the terms of that contract, was made by the plaintiff's subsidiary company, National Lumber & Creosoting Company at the time of the completion of the treatment. During the years of 1934, 1935 and 1936, none of the ties were ever carried by the Railroad Company to points in Indiana, but all ties were at all times carried to Finney, Ohio for treatment. Plaintiff did not during the years of 1934, 1935 and 1936 receive any funds in the State of Indiana. All agents of the plaintiff who, during the years 1934, 1935 and 1936 had contact with the ties originating in Indiana, were responsible to and traveled from the Pittsburgh, Pennsylvania and Marietta, Ohio offices of the Company, and none of such agents had a regularly established place of business in the State of Indiana.

10. All of the Regulations officially promulgated by the Department of Treasury pursuant to the provisions of Section 25 (a) of Chapter 50 of the Indiana Acts of 1933, and in force during the years 1934, 1935 and 1936, so far as pertinent or material to the issues in this case, may be judicially noticed by the Court.

71 11. Plaintiff maintained no office in the State of Indiana. In addition to the agent maintained by plaintiff in the City of Indianapolis, Indiana, for the service of process, plaintiff during the years 1934, 1935 and 1936 normally had one agent or employee assigned to the Indiana territory who was engaged in the buying of ties and was responsible to the Marietta, Ohio, office. Plaintiff's District Manager of Production and Operation, with headquarters at plaintiff's Marietta, Ohio, office, made periodical trips to Indiana during said years to interview people with whom plaintiff did business in relation to complaints, giving them assistance, and other matters that were beyond the authority of the normal field man's scope.

At the end of each day's loading of ties along the right of way of the Railroad in Indiana, the ties were billed by plaintiff's agent in the name of Wood Preserving Corporation, as shipper, to the Baltimore & Ohio Railroad, in

care of the person who was at the time Chief Engineer of Maintenance, at Finney, Ohio. A copy of the written instrument typically used in such billing during the years 1934, 1935 and 1936 is attached to this finding, marked "Exhibit No. 1" and made a part hereof. The plaintiff paid no freight to the Railroad Company for transportation to Finney, Ohio, of the ties so loaded in Indiana and billed to the Railroad Company as above stated.

Shortly after the assignment to plaintiff on May 3, 1933, by Joyce-Watkins Company of its contract with Baltimore & Ohio Railroad Company, and prior to the beginning of plaintiff's operations under said contract, W. S. Galloway, Purchasing Agent of the Baltimore & Ohio Railroad Company, whose office was at Baltimore, Maryland, in oral conversation with Sherman S. Watkins, who was plaintiff's District Manager of Production and
72 Operation during the years 1934, 1935 and 1936, with headquarters at plaintiff's office at Marietta, Ohio, gave instructions to said District Manager for plaintiff as follows:

"You will, of course, ship all ties originating at points on the B. & O. Railroad west of the Ohio River to Finney, Ohio; and ties originating east of the Ohio River to Green Spring, West Virginia."

These instructions relative to shipment of ties were accepted and carried out by plaintiff during the years 1934, 1935 and 1936.

All of the ties furnished by plaintiff to the Baltimore & Ohio Railroad Company under the Joyce-Watkins contract during the years 1934, 1935 and 1936 were treated before use by the Railroad Company.

The gross receipts referred to at the end of Finding No. 8 (d) were receipts by plaintiff from cross ties sold and delivered to the Railroad Company pursuant to the contracts above referred to and the course of dealings as set out in these findings of fact.

Robert C. Baltzell,
Judge.

July 12, 1939.

73 **EXHIBIT NO. 1.**

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern and Western Classification territories, March 15, 1922, as amended August 1, 1930.)

1st Sheet

Uniform Straight Bill of Lading
(Prescribed by the Interstate Commerce Commission)
Original—Not Negotiable

(Cut)

Shippers, No._____

Agent's No._____

The Baltimore and Ohio Railroad Company

Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,
at Vallonia, Ind. Dec. 3, 1935
from Wood Preserving Corp.
the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown, marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—)
(For purposes of notification only)

Consigned to B & O R. R. Co. % E. Stimson
Destination Finney State of Ohio County of_____
Route_____
Delivering Carrier_____ Car Initial B & O Car No. 171399

No. Packages	Description of Articles, Special Marks and Exceptions	*Weight (Subject to Correction)	Class or Rate	Check Column
1	Car Cross Ties Copy			

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

_____
(Signature of Consignor)

If charges are to be prepaid write or stamp here, "To Be Prepaid."

_____

Received $_____ to apply in prepayment of the charges on the property described hereon.

_____
Agent or Cashier

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$_____

Wood Preserving Corp.,
Shipper.

Per HCOST
O. D. Schadley,
Agent.

Per _____

Permanent post-office address of Shipper _____

Contract Terms and Conditions.

Sec. 1 (a) The carrier or party in possession of any of the property herein described shall be liable as at common laws for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party, entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property, shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case

of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to

necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks,

in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, ship-

ping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not

those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not cov-

ered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, than as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enfroceable according to its original tenor.

74 Upon the above and foregoing Special Findings of Fact, the court now states its Conclusions of Law, as follows:

First: That the law is with the defendants and that the plaintiff should take nothing in this action.

Second: That the defendants should recover of and from the plaintiff herein their costs taxed at $.....

Robert C. Baltzell,
Judge U. S. District Court.

July 12, 1939.

75 (Entry continued for July 12, 1939.)

It Is Therefore Ordered, Adjudged and Decreed by the court that the plaintiff take nothing in this action and that the defendants recover of and from the plaintiff their costs herein, taxed at $_____.

76 And afterwards to wit at the May Term of said Court, on the 25th day of September, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Entered July 12, 1939.

Comes now the plaintiff by its attorneys and files notice of appeal, which notice is as follows:

77 In the District Court of the United States Filed Sept. 25, 1939.

For the Southern District of Indiana,

Indianapolis Division.

The Wood Preserving Corporation, *Plaintiff,*

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of the Department of Treasury of the State of Indiana, *Defendants.* } No. 8 Civil.

NOTICE OF APPEAL.

Filed Sept. 25, 1939. Albert C. Sogemeier, Clerk.

Notice is hereby given that The Wood Preserving Corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment of the Court in this cause to the effect that

the plaintiff take nothing in the action, which judgment was entered on July 12, 1939.

(sgd) Frederick E. Matson,
(sgd) Harry T. Ice,
(sgd) Carelton M. Crick,
Attorneys for Plaintiff-Appellant, The Wood Preserving Corporation.

951 Consolidated Building,
Indianapolis, Indiana.

78 (Entry continued for September 25, 1939.)

And the plaintiff also files appeal bond in the sum of Two Hundred Fifty Dollars ($250.00) with Untied States Guarantee Company as surety, which bond is as follows:

Filed Sept. 25, 1939.

79 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—8)

APPEAL BOND.

Know All Men By These Presents, That we, The Wood Preserving Corporation, as Principal, and United States Guarantee Company, as Surety, are held and firmly bound unto Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of the Department of Treasury of the State of Indiana, as appellees, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to said appellees, their successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, severally by these presents.

Sealed with our seals and dated this 25th day of September, 1939.

Whereas there was rendered at the May Term of the United States District Court for the Southern District of Indiana, Indianapolis Division, in a suit pending in said Court between The Wood Preserving Corporation, plaintiff, and Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of the Department of
80 Treasury of the State of Indiana, defendants, a judgment against said plaintiff on the 12th day of July,

1939, and the said plaintiff has duly filed a notice of an appeal from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit.

Now therefore, the condition of the above obligation is such that if the said The Wood Preserving Corporation shall prosecute this appeal to effect and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award with the judgment being modified, then the above obligation is to be void, otherwise to remain in full force and effect.

The Wood Preserving Corporation,
By Harry T. Ice,
Attorney.

Countersigned By:
Marsh & McLennan, Incorporated,
By Geo. E. Home,
(Seal) *Vice-Pres.*

United States Guarantee Company,
By Carl F. Eilert,
attorney-in-fact.
Robert E. Powell
attorney-in-fact.

81 (Entry continued for September 25, 1939.)

And the plaintiff also files statement of points, which is as follows:

82 In the District Court of the United States. Filed Sept. 25, 1939.
(Caption—8)

STATEMENT OF POINTS.

The plaintiff-appellant, pursuant to Rule 75(d) of the Rules of Civil Procedure for the District Courts of the United States, now makes this concise statement of the points on which plaintiff-appellant intends to rely on the appeal.

Plaintiff, as appellant on appeal, will rely upon the following points as supporting its contention that the Court committed error in its conclusions of law and in the entry of judgment on July 12, 1939, against plaintiff-

appellant, denying to plaintiff-appellant recovery of the sums sought in the complaint.

Point One. Plaintiff-appellant should have recovered the sums sought, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between this State and other States of the United States, which under the terms and provisions of Section 6(a) of the Gross Income Tax Act of Indiana is exempt from taxation (Section 6(a), Chapter 50, Acts of 1933; Section 6(a), Chapter 117 of the Acts of 1937).

Point Two. Plaintiff-appellant should have recovered the sums sought, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between this State and other States of the United States, and if said receipts are not exempt under the provisions of Section 6(a) of said Act, then said Act is invalid and void and said assessment
83 illegal as to such receipts for the reason that the tax assessed constitutes a regulation of and a burden upon commerce between the State of Indiana and other States of the United States, in conflict with Article I, Section 8, of the Constitution of the United States.

Point Three. Plaintiff-appellant should have recovered the sums sought, for the reason that the sums represent a tax imposed upon receipts which were not received by plaintiff-appellant within the State of Indiana; such receipts therefore are not subject to the provisions of said gross income tax act, as no taxable event occurred in Indiana, and the imposition of a tax upon such receipts constitutes a denial to plaintiff-appellant of the due process of law, and such tax is illegal and void as being in conflict with the Fourteenth Amendment of the Constitution of the United States.

Point Four: Plaintiff-appellant should have recovered the sums sought, for the reason that the sums represent a tax imposed upon receipts derived from activities and business, a large portion of which was carried out by services and functions performed in States other than the State of Indiana, and the imposition of a tax upon all of the receipts, without allocation as to services and functions performed within and without the State of Indiana, constitutes a denial to plaintiff-appellant of due process of

law, and such tax is illegal and void, as being in conflict with the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,
Frederick E. Matson,
Harry T. Ice,
Carleton M. Crick,
Attorneys for Plaintiff-Appellant.

84 (Entry continued for September 25, 1939.)

And the parties also file stipulation as to record, which stipulation is as follows:

85 In the District Court of the United States. Filed Sept. 25, 1939.
(Caption—8)

STIPULATION AS TO RECORD.

It Is Hereby Stipulated between the parties in the above-entitled cause, and pursuant to Rule 75(f) of the Rules of Civil Procedure for the District Courts of the United States, that instead of serving designations of the record as provided for in the aforesaid Rules, the parties do now designate the following parts of the record, proceedings and evidence to be included in the record on appeal, and the same shall be prepared by the Clerk of the Court for use on such appeal to the United States Circuit Court of Appeals for the Seventh Circuit:

1. Bill of complaint;
2. All appearances for defendants;
3. Answers of defendants;
4. Finding of facts;
5. Conclusions of law;
6. Final judgment entered July 12, 1939;
7. All order book entries in said cause not enumerated herein;
8. Notice of appeal;
9. Appeal bond;
10. This stipulation as to the designation of parts of the record;

11. Plaintiff's statement of points to be relied upon;
12. Clerk's certificate to transcript of record.

86 In Witness Whereof we have hereunto set our hands this 25th day of September, 1939.

Frederick E. Matson,
Harry T. Ice,
Carleton M. Crick,
Attorneys for Plaintiff-Appellant, The Wood Preserving Corporation.
Joseph W. Hutchinson,
Joseph L. McNamara,
Attorneys for Defendants-Appellees, Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of the Department of Treasury of the State of Indiana.

87 United States of America,
Southern District of Indiana, } ss.
Indianapolis Division.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the records and proceeding in the cause of The Wood Preserving Corporation *vs.* Department of Treasury of the State of Indiana, et al., No. 8 Civil, according to the stipulation as to record filed September 25, 1939, now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 29th day of September, 1939.

Albert C. Sogemeier,
(Seal) *Clerk, United States District Court, Southern District of Indiana.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the twenty-fourth day of November, 1939, in the following entitled cause:

Cause No. 7126.

The Wood Preserving Corporation,
Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of December, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

The Wood Preserving Corporation,
Plaintiff-Appellant,
7126 *vs.*
Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

And, to-wit: On the thirty-first day of October, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7126. October Term, 19.....

The Wood Preserving Corporation,
Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*,
Defendant-Appellee.

The Clerk will enter my appearance as counsel for the Defendant-Appellee.

Joseph W. Hutchinson,
Joseph P. McNamara,
Attorney General's Office,
219 Statehouse,
Indianapolis, Ind.

Endorsed: Filed Oct. 31, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-seventh day of November, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7426. October Term, 19.....

The Wood Preserving Corporation,
Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*,
Defendant-Appellee.

The Clerk will enter my appearance as counsel for the Plaintiff-Appellant.

Frederick E. Motson,
Harry T. Ice,
951 Consolidated Bldg.,
Indianapolis, Ind.

Endorsed: Filed Nov. 27, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the tenth day of June, 1940, the following further proceedings were had and entered of record, to-wit:

Monday, June 10, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

The Wood Preserving Corporation,
Plaintiff-Appellant,
7126 *vs.*
Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of the record and briefs of counsel and on oral argument by Mr. Frederick E. Matson, counsel for appellant, and by Mr. Joseph P. McNamara and Mr. Joseph W. Hutchinson, counsel for appellees, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twentieth day of July, 1940, there was filed in the office of the Clerk of this Court, an opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7126. October Term, 1939, April Session, 1940.

THE WOOD PRESERVING CORPORATION,
Plaintiff-Appellant,
vs.
DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, *Et Al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

July 20, 1940.

Before SPARKS and MAJOR, *Circuit Judges*, and LINDLEY, *District Judge*.

MAJOR, *Circuit Judge*. This is an appeal from a judgment against the plaintiff in an action to recover taxes collected by defendants under the Indiana Gross Income Tax Act of 1933. (Chap. 50, Indiana Acts 1933, Burns Statutes Annotated, 1933, Sec. 64—2601 *et seq.*) The court adopted the "stipulation of findings" filed by the parties as its special findings of fact, and stated its conclusions thereon. The errors relied on arise out of the court's conclusions of law.

The facts, as found by the court, are lengthy, and while not in dispute, it seems essential to state a resumé of the same in order properly to consider the questions of law presented.

All the gross receipts in question were received by plaintiff during 1934, 1935 and 1936 (the taxable years), from the sale of cross-ties furnished to the Baltimore and Ohio Railroad Company pursuant to certain contracts and course

of dealings had between the parties. One contract was between Central Creosoting Company of Delaware, operating a treatment plant[1] at Finney, Ohio, and the railroad, a Maryland Corporation, with main offices at Baltimore, Maryland, executed December 21, 1922, which, prior to 1933, was assigned to National Lumber and Creosoting Company. Subsequently, but prior to 1933, plaintiff acquired control of this company and operated it as a subsidiary. By this contract, the railroad was required to deliver annually to the plant at Finney, Ohio, a minimum of 600,000 ties for treatment. The railroad had another contract with the Joyce-Watkins Company of Illinois, which operated a treatment plant, owned by the railroad, at Green Springs, West Virginia. This contract was assigned by Joyce-Watkins to plaintiff March 1, 1933, and provided terms by which plaintiff was to purchase and sell ties to the railroad and operate the plant. Before plaintiff commenced operations, a supplemental agreement was made between the railroad and the plaintiff, accepted and followed by the plaintiffs during the taxable years, that all ties originating at points on the railroad west of the Ohio River (including Indiana), should be shipped by plaintiff to Finney, Ohio.

Plaintiff is a Pennsylvania corporation with its main office at Pittsburgh. Its office from which its tie business was operated was at Marietta, Ohio. It maintained no office in Indiana, but was qualified to do business in that state where it had a statutory agent for service of process. The railroad company, when it desired ties—in conformity with the Joyce-Watkins contract—through its purchasing agent at Baltimore, Maryland, telephoned plaintiff's Marietta office, stating the number of ties wanted and the price it would pay delivered f. o. b. cars at loading point. Plaintiff's Marietta office would then send a price list circular to producers of ties in its territory, including Indiana, which contained specifications, prices to be paid on the ground at loading point, and the information that plaintiff would pay additional for loading ties on the cars. In response to this price circular, the producers would notify plaintiff at its Marietta office by mail, telephone or telegraph of the quantity, type and quality of ties they could furnish, as

1. A treatment plant is one in which the raw ties are creosoted or otherwise treated prior to use by the railroad. Plaintiff's compensation for such service was not included in, and forms no part of, the gross income involved in this litigation.

well as the nearest loading point. Ties were delivered to such point by the producers, where an agent of the plaintiff, assigned from its Marietta office, and an inspector for the railroad, would go. The ties were examined by the railroad inspector and accepted or rejected. If accepted, they were loaded upon a car of the railroad at plaintiff's expense.

At the end of each day, the railroad inspector would make out a report of ties accepted, and give a copy to plaintiff's agent. On the basis of this report, plaintiff's agent each day paid the producer by sight draft on banks outside the state, for ties accepted by the railroad. The producer received no pay for ties rejected. When loading was completed, plaintiff's agent made out a uniform bill of lading showing plaintiff as consignor, consigning the ties to the railroad in care of its chief engineer of maintenance at Finney, Ohio. Plaintiff paid no freight for transporting the ties. Plaintiff's agent then sent to its Marietta office a copy of the railroad inspector's report of ties accepted and loaded, a copy of the draft used in paying the producer, and a shipping report showing the number and type of ties delivered to the railroad, the number of the car and the billing to Finney, Ohio. The agent also sent to the Finney, Ohio treatment plant, copies of the same papers; and to the railroad office at Baltimore, Maryland, a copy of the billing of the car to its chief engineer of maintenance at Finney, Ohio. At the end of each week, plaintiff's Marietta office made out and sent to the railroad at its Baltimore office, an invoice of ties sold and delivered to it during the previous week. At the end of each month, plaintiff's Marietta office sent its Pittsburgh office a statement showing all invoices rendered the railroad during the month for ties loaded in Indiana and shipped to Finney, Ohio. All ties purchased from plaintiff by the railroad during the taxable years were delivered to Finney, Ohio for treatment. All office and bookkeeping functions connected with these transactions were performed at plaintiff's office in Marietta, Ohio, and Pittsburgh, Pennsylvania.

No payments for ties were received by plaintiff in Indiana. They were all made by the railroad from its Baltimore office and sent to plaintiff at its office in Pittsburgh, Pennsylvania, and deposited by plaintiff in its Pittsburgh bank. It is the income thus received about which the controversy in the instant case revolves.

The contested issues are not in dispute and, as stated by plaintiff, are:

1. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the due process clause of the 14th Amendment to the Federal Constitution, because laid upon a taxable event—the receipt of gross income—which occurred outside the territorial limits of Indiana and beyond the jurisdiction of the taxing authorities.

2. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the due process clause of the 14th Amendment to the Federal Constitution, because laid without allocation or apportionment upon business activities both without and within the territorial limits of Indiana and, as to activities outside the state, beyond the jurisdiction of the taxing authorities.

3. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the commerce clause, Article I, Section 8, of the Federal Constitution, because laid upon receipts derived from interstate commerce, constitute a direct burden upon such commerce and are of a type which subjects the commerce to the risk of multiple taxation of like kind in other states.

The solution of the first contested issue depends upon an answer to the question—What was the taxable event? It is contended by the plaintiff that the event was the receipt of gross income which occurred in Pennsylvania. If this position is sound, it is evident—in fact, not disputed—that the State of Indiana was without power to levy and collect the tax. It is defendants' contention, as stated in their brief, that "the thing which the Statute authorizes as the taxable event, the thing which was taxed, is the transaction which occurs within Indiana involved in one of two things, either doing business within the state or deriving income from a source within the state." Under this theory, the gross income received in Pennsylvania is merely the measure for the tax.

It is at once apparent that the respective contentions require a construction of the Statute relied upon as authority for the tax. The Act is entitled "An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income. * * *" Section 1 pro-

vides that this Act may be cited as the "Gross Income Tax Act of 1933." Section 2 of the Act, the one in controversy, provides:

> "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived *from sources* within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities * * *"

Section 3 provides the applicable rates "upon the entire gross income of every person * * *"

This Act has been construed by the Supreme Court in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. There, the taxpayer, an Indiana corporation, was a manufacturer of road machinery and equipment, and maintained its home office, principal place of business, and factory in the state. A good part of its products was sold to customers in states other than Indiana. Payments for its products were remitted to the home office. The case reached the Supreme Court by appeal from the Supreme Court of Indiana which had construed the tax to be "upon the privilege of domicile, and transacting business, and receiving gross income within the state, and measured by the amount of gross income." This construction was reversed by the Supreme Court of the United States. The court points out (page 310) that it is not a tax on the transaction of business, nor a charter or franchise tax, nor a tax upon the privilege of producing or manufacturing within the state, but said: (page 311) "We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce." The court, on the same page, also said:

> "The regulations issued by the Department of the Treasury, pursuant to authority granted by the Act, treat the exaction as a gross receipts tax; and the Attorney General says in his brief that it is a privilege tax upon the receipt of gross income. We think this is a correct description."

The distinction sought to be made by defendants between the Adams case and the instant one is, that in the former the taxpayer was a resident of the state, while in the latter the taxpayer is a non-resident, and that, therefore, the language of the Act "such tax shall be levied * * * upon the gross income derived from sources within the State of Indiana * * *, engaged in business in this state, or who derive gross income from sources within this state," upon which the instant tax is predicated, was not before the Supreme Court in the Adams case and, therefore, that case is not controlling.

The distinction sought to be made, if sustained, leads to the result that two separate and distinct "taxing events" are contemplated by the Act, (1) where the gross income is received by a resident, and (2) where gross income is received by a non-resident. As to the former, the court held the taxable event to be "the receipt of gross income." It is here argued by the defendants that the taxable event is not the receipt of gross income, but the privilege of doing business or deriving income from a source within the state. Defendants insist that the plain language of the Act requires such a construction. We do not agree. As the Supreme Court pointed out in the Adams case (page 309), "the title of the Act declares that it is a revenue measure imposing a tax upon 'the receipt of gross income.' The Statute defines gross income as meaning the gross receipts derived from trades, businesses or commerce." It seems certain that the title of the Act applies to non-residents as well as residents. All through the Act the tax is referred to as one upon "gross income." The regulations of the Treasury Department (footnote, Adams case, page 311) clearly treat the taxable event as "gross income received." It appears to us that the non-resident provision of the Act, upon which defendants rely, was intended to apply to persons, not legal residents of the State, but living temporarily, or engaged in business in the state and receiving income there. That construction is consistent with the title and terms of the Act, as well as the interpretation placed thereon by the Supreme Court in the Adams case. On the other hand, the construction sought by defendants is inconsistent therewith. Defendants rely strongly upon *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, as sustaining their contention. There the tax related to premiums received by insurance companies. The company contended it was a tax on property, but the Act was con-

strued both by the State Court and the Supreme Court as "levying a tax for the privilege of doing business within the commonwealth." The tax was sustained in that case on a theory similar to that adopted by the court in *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, where the tax was laid on the privilege of pursuing the occupation of a manufacturer in the City of St. Louis. This latter case was referred to, and distinguished by the Court in, the Adams case (page 312).

Concluding as we do, that the thing taxed in the instant case was "the receipt of gross income," it follows that such income received by plaintiff in Pennsylvania was beyond the jurisdiction of the State of Indiana to tax, and that the collection of such tax was unconstitutional and void. *Safe Deposit and T. Co.* v. *Virginia*, 280 U. S. 83, 92; *Curry* v. *McCanless*, 307 U. S. 357, 366.

Under the second contested issue, it is contended by the plaintiff that the tax is invalid because laid without allocation or apportionment upon business activities both within and without the State of Indiana. Defendants meet this contention by asserting that plaintiff's income was derived from business engaged in, and from a source within Indiana, and that there was nothing to apportion. The conflicting views under this issue arise from a disagreement as to the factual situation rather than legal conclusions. We think it has been held generally that before a valid tax can be laid upon a business conducted in, or source of income received from more than one state, there must be an allocation or apportionment of that portion of the business done in, or source of income received from, the taxing state. *Adams Mfg. Co.* v. *Storen, supra*, 314; *Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, 439. The question which naturally arises and is determinative of this issue is, whether the receipt by plaintiff of gross income was derived from business engaged in and from a source within the State of Indiana. Defendants contend that the only transaction involved was plaintiff's sale and delivery in Indiana of raw, untreated cross-ties to the railroad. If this be true, it follows that the cases which stand for the apportionment theory, are without application.

We are of the opinion, however, that defendants' contention in this respect is not tenable. We have stated heretofore the facts concerning the transactions constitut-

ing the source of income and shall not repeat. It is sufficient to point out that a sizable portion of the business affording the source of income, was transacted outside the State of Indiana, both before and subsequent to the actual delivery of the ties to the railroad. It is true, the immediate receipt of the income was from the sale of the ties, which took place in Indiana, but what took place there was merely a culmination of contracts and transactions entered into outside of that state. Had it not been for such contracts and transactions, it appears there would have been no source of income in Indiana or elsewhere. That such outside transactions contributed materially to the source of income within the state, there is little, if any, room for doubt. To think otherwise is to close our eyes to the realities of the situation and view the business and transactions of the parties as consisting only of the delivery of the ties. It is our conclusion, therefore, that the source of income was not confined to transactions occurring in Indiana, but was contributed to largely by transactions occurring in other states. Therefore, the situation comes within those authorities which hold that an apportionment is required.

Nor do we think, as argued, that the burden is upon the taxpayer to make an apportionment. It would seem more reasonable to think that it is incumbent upon the state, which seeks to impose the tax, to provide a method of determining that portion of the income derived from transactions occurring within the state. In *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, 133, the court discusses a similar question and appears to recognize that the burden is upon the state to adopt a method which will be sustained in absence of proof that it is unreasonable or arbitrary. (See cases cited and discussed in *Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, at 438-441.)

Assuming that defendants' theory as to the "taxable event" is sound (we have held to the contrary), yet we are of the opinion that the tax as laid is invalid because no method is provided by the Act or otherwise for allocating the tax to the income derived from that part of the business transacted in Indiana.

The third contested issue is closely related to the second, and much of what has been said concerning the latter is applicable. The defendants' position is again predicated on the theory that the gross income used as the tax meas-

ure, was the result of intra-state transactions independent of interstate commerce, or if related to interstate commerce, in a manner such as to place no substantial burden thereon.

Here also, we think defendants' argument is based upon an erroneous appraisement of the activities which entered into the transactions providing the source of income. As stated heretofore, we are of the opinion that the transactions which occurred in Indiana constituted merely a portion of the business in which the parties were engaged. Defendants stress the argument that the ties were delivered to the purchaser (railroad) in Indiana to be used by the railroad company as it saw fit, and without cost of transportation to the plaintiff. In this connection, it is argued that title passed to the railroad at the time of delivery and that the plaintiff no longer had any control or dominion over the ties.

This argument, however, ignores what we think the facts disclose—that is, that the plaintiff and the railroad were obligated by contracts, the former to purchase the ties and deliver them to the railroad for the purpose of transportation into another state to a treatment plant in which plaintiff had a controlling interest, and the latter to make such transportation. Under these circumstances, we do not think it is material, and certainly not controlling, as to whether the railroad acquired title at the point where the ties were received in Indiana, or at the point in Ohio where they were consigned by the plaintiff and received by the maintenance department of the railroad. *Spalding & Bros.* v. *Edwards*, 262 U. S. 66, 70; *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 463. Even if the carrier acquired title at the receiving point, with the technical right to ship where it pleased or to use the ties otherwise than as intended, it would not change the situation. As was said in discussing a similar contention in *Spalding & Bros., supra*, page 70:

> "* * * There was not the slightest probability of any such change and it did not occur. * * * Theoretical possibilities may be left out of account."

In the instant case the parties, without deviation, followed the same course of conduct during the taxable years. If we are correct in our premise that the parties were doing business under a contract obligation, the statement

of the court in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 515, seems pertinent. The court said:

> "* * * They were in effect contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and a burden upon it. (Citing cases.)"

The loading of the ties upon the railroad car for the purpose of transportation to another state was in itself an act of interstate commerce. In *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90, 94, the court said:

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. * * *"

Defendants place great reliance upon the case of *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390. A study of this case, however, is convincing that it has little, if any, relevancy to the instant situation. There the State of Mississippi sought to collect a tax upon gasoline sent by the oil company to packers of sea food located in the same state. The latter, after receipt of the gasoline, were free to dispose of it as they saw fit. After its receipt, the gasoline was loaded on their own boats and carried to fishermen across the state line in Louisiana. It was contended that this course of dealing was known to the oil company, and, in addition, when delivery was made to the packers, it took back from the latter a so-called bill of lading reciting that the property continued to be the property of the oil company until its delivery in Louisiana. The court labeled this document as an effort (page 394) "* * * to try to convert a domestic transaction into one of interstate commerce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout. * * *" Again the court, (page 395) said: "* * * But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. * * * The only purpose of

the vendor here was to escape taxation. * * *" Such a situation has little similarity to that of the instant case where the parties were engaged in bona fide transactions in conformity with contractual obligations, as well as with long usage and custom. Here there is not even a suspicion of an effort to avoid taxation. In fact, the same course of business had been followed by the parties continuously since a period prior to the enactment of the Act in question.

A case very much discussed in the briefs by parties for both sides is that of *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282. There, by contracts made in Kentucky, a farmer agreed to sell wheat to Dahnke-Walker and deliver it f.o.b. cars at the farmer's home in Kentucky. The wheat was paid for there, and title passed to the purchaser when the wheat was loaded on the cars. Afterwards, the seller had no control or dominion over the wheat. Thus, the entire transaction of purchase and sale, including delivery, payment, and passage of title—all occurred in Kentucky. It was shown, however, that by the course of business in prior years, the wheat was intended to go to Tennessee for treatment at the purchaser's mill. That had been the practice and custom in the past, and was known to both parties. The court held the transaction to be interstate commerce on the principle that (page 290) "* * * where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation. * * *" The fact is stressed (page 292) "* * * that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. * * *" The facts of the present case are stronger in favor of interstate commerce. Here, all payments were made and received out of the state and the purchaser, even if title passed at the loading point, could not have prevented the ties from going to Finney, Ohio, without violating its contract to deliver them there for treatment. Here also, both parties had an interest in transporting the ties from Indiana to Finney, Ohio.

Defendants seek to distinguish the *Dahnke-Walker* case in two ways, (1) that in the instant case the purchaser (railroad) was the common carrier, while in the *Dahnke-Walker* case the carrier was a third party, and (2) in that case the court was not concerned with the power to tax,

but with the power to regulate. As to (1), we think it has been held generally that the fact that the carrier is itself the owner of the property being transported, is a circumstance only to be considered in determining the nature of the commerce. In no case, so far as we are aware, has it been held conclusive. The Pipe Line Cases, 234 U. S. 548, 560; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 281; *Standard Oil Co.* v. *Johnson*, 92 Pac. (2d) 470, 472-473. As to (2), it is true the court in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 514, called attention to the fact that the *Dahnke-Walker* case was not concerned with the power to tax, but we know of no case where such distinction has been given application. The court made no such distinction in *Minnesota* v. *Blasius*, 290 U. S. 1, which was a revenue case. After citing the *Dahnke-Walker* and other cases, the court, on page 9, said:

> "* * * Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the States may not tax property in transit in interstate commerce. * * *"

True, the court sustained the tax on the proposition that the transportation claimed to be interstate had ceased and was no longer protected by the commerce clause. No distinction was made, however, between the power to tax and the power to regulate such commerce.

We reach the conclusion that the transactions in question were had in interstate commerce. It does not always follow, however, that interstate commerce is immune from taxation. *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254-255; *Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, 438. Both of these cases, however, stand for the rule often announced, that state taxation, whatever its form, is precluded if it discriminates against interstate commerce.

If we are correct in our conclusions thus far, we think it must be held that the tax in question so discriminates. It appears plausible that the State of Ohio, wherein plaintiff's business was largely conducted, and where a portion of the transactions were had giving rise to the income received, could impose a similar tax, and more certain that the State of Pennsylvania, where the income was actually received, could do likewise. In *Gwin, etc., Inc.* v. *Henne-*

ford, supra, the court, in considering a situation similar to the instant one, on page 439, said:

> "* * * If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. * * *"

It is our conclusion, therefore, that the tax in question discriminates against interstate commerce, and for that reason is void. *Adams Mfg. Co.* v. *Storen, supra.*

The judgment of the District Court is

REVERSED.

LINDLEY, *District Judge,* Dissenting:

The Indiana statute imposes a tax upon the gross income of all residents of the state and upon the gross income, "derived from sources within the state," of non-residents engaged in business in the state or "who derive gross income from sources within the state." Here the income sought to be taxed arose from the delivery in Indiana by the seller to the buyer of railroad ties produced in Indiana, in pursuance of orders received from outside the state. Title passed from the seller to the purchaser upon delivery within Indiana and the income received by the seller arose solely from sources within the state. The tax is clearly assessable under the statute unless it is a discrimination against or constitutes a burden upon interstate commerce.

A non-discriminatory tax upon articles eventually destined for interstate commerce, even though ordered from without the state, where the transaction is completed within the state, does not, it seems to me, under the decisions of the Supreme Court, amount to undue discrimination against, interference with, or burden upon, interstate commerce.

I have fully stated my reasons for this conclusion in my dissent in *Nudelman* v. *Globe Varnish Company.* As said there, the question presented is not one of the power or extent of the power of the Congress to regulate interstate commerce. Rather, it is a question of whether a tax upon income, clearly derived from sources within the state, constitutes discrimination against interstate commerce even though measured by the same yardstick as the tax upon

income of residents,—whether it is removed from the non-discriminatory category by the fact that the articles are intended eventually to pass into interstate commerce. An affirmative conclusion, it is my conviction, is not justified under the decisions of the Supreme Court.

The doctrine of apportionment is in no wise applicable. The income involved arose entirely from sources within the state. Hence there is nothing to apportion between Indiana and other states.

I think the judgment should be

AFFIRMED.

Endorsed: Filed July 20, 1940. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twentieth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, July 20, 1940.

Court met pursuant to adjournment.
Before:

Hon. William M. Sparks, Circuit Judge
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, District Judge

The Wood Preserving Corporation *Plaintiff-appellant,* vs. Department of Treasury of the State of Indiana, *et al.,* *Defendants-appellees.*	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

7126

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said District Court.

And afterwards, to-wit: On the second day of August, 1940, there was filed in the office of the Clerk of this Court, a petition for a rehearing which said petition for a rehearing is not copied here.

And afterwards, to-wit: On the tenth day of August, 1940, there was filed in the office of the Clerk of this Court, an answer to petition for a rehearing which said answer is not copied here.

And afterwards, to-wit: On the fifth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, October 5, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

The Wood Preserving Corporation,
Plaintiff-Appellant,
7126 *vs.*
Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and it is hereby, denied.

And afterwards, to-wit: On the ninth day of October, 1940, there was filed in the office of the Clerk of this Court, a motion for stay of issuance of mandate, which said motion is in the words and figures followng, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

Seventh Circuit.

The Wood Preserving Corporation,
Plaintiff-Appellant,
vs.
Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana,
Defendants-Appellees.
No. 7126.

MOTION FOR STAY OF ISSUANCE OF MANDATE.

The appellees, Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana, now move the Court to enter an order withholding the mandate in this case because it is the bona fide intention of the appellees to make a proper application to the Supreme Court of the United States for a Writ of Certiorari in this case, and in support of this motion, the appellees attach the professional statement of its counsel.

Samuel D. Jackson,
Samuel D. Jackson,
Attorney General of Indiana,
Joseph W. Hutchison,
Joseph W. Hutchison,
Deputy Attorney General,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Counsel for Appellees.

I, Joseph W. Hutchinson, certify that it is the bona fide intention of the appellees in the above-entitled case to make an application to the Supreme Court of the United States for a Writ of Certiorari within the time limited by law, and, I believe there is merit in appellees' case and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in said case

ought to be reversed by the Supreme Court of the United States.

Dated this 8th day of October, 1940.

Joseph W. Hutchinson.
Joseph W. Hutchinson.
Indianapolis, Indiana.

The Wood Preserving Corporation, appellant, by its counsel, acknowledges service of above Motion for Stay of Mandate and receipt of copy of said Motion on October 8, 1940. On Octber 8, 1940, the undersigned was informed of said Motion and notified that it would be filed at once.

Matson, Ross, McCord & Ice,
By Harry T. Ice,
Attorneys for Appellant.

Endorsed: Filed Oct. 9, 1940, Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the sixteenth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Thursday, October 16, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

The Wood Preserving Company,
Plaintiff-appellant,
7126 *vs.*
Department of Treasury of the State of Indiana, *et al.*,
Defendants-appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

On motion of counsel for appellees, it is ordered that the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the fourteenth day of November, 1940, there was filed in the office of the Clerk of this Court, motion for further stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Seventh Circuit.

The Wood Preserving Corporation,
Plaintiff-Appellant,
vs.
Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana,
Plaintiff-Appellant,
} No. 7126.

MOTION FOR STAY OF ISSUANCE OF MANDATE

The appellees, Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana, now move the Court to enter an order further withholding the mandate in this case because it is the bona fide intention of the appellees to make a proper application to the Supreme Court of the United States for a Writ of Certiorari in this case, and appellees now respectfully represent that numerous other engagements and the preparation of other briefs have prevented the appellees from perfecting their application to the Supreme Court of the United States for a Writ of Certiorari within the time that the mandate was originally stayed by this Court, and in support of this motion the appellees attach the professional statement of its counsel.

Samuel D. Jackson,
Samuel D. Jackson,
Attorney General of Indiana,
Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Counsel for Appellees.

I, Joseph P. McNamara, certify that it is the bona fide intention of the appellees in the above-entitled case to make an application to the Supreme Court of the United States for a Writ of Certiorari within the time limited by law, and I believe there is merit in appellees' case and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in said case ought to be reversed by the Supreme Court of the United States.

Dated this thirteenth day of November, 1940.

Joseph P. McNamara.

Joseph P. McNamara.

Indianapolis, Indiana.

The Wood Preserving Corporation, appellant, by its counsel, acknowledges service of above Motion for Stay of Mandate and receipt of copy of said Motion on November 13, 1940. On November 13, 1940, the undersigned was informed of said Motion and notified that it would be filed at once.

Frederick E. Matson,
Harry T. Ice,
Attorneys for Appellant.

Endorsed: Filed Nov. 14, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifteenth day of November, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, November 15, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

The Wood Preserving Corporation, *Plaintiff-appellant,* vs. Department of Treasury of the State of Indiana, *et al.*, *Defendants-appellees.*	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

7126

It is ordered that the motion of counsel for appellees for a further stay of issuance of the mandate of this Court in this cause be, and it is hereby, granted.

And afterwards, to-wit: On the twentieth day of November, 1940, there was filed in the office of the Clerk of this Court, a praecipe for record, which said praecipe is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

Seventh Circuit

The Wood Preserving Corporation,
Plaintiff-Appellant,
vs.
Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana,
Defendants-Appellees.
No. 7126.

To the Honorable Kenneth J. Carrick,
Clerk, U. S. Circuit Court of Appeals for the Seventh Circuit,
1212 Lake Shore Drive,
Chicago, Illinois.

The defendants-appellees in the above cause respectfully request that you prepare for use in the presentation of a petition for certiorari a true and complete copy of the record in the above entitled cause, including but not in limitation thereof, a copy of the printed record filed in the United States Circuit Court of Appeals in said cause, and a full, true and complete copy of the proceedings had in said Circuit Court of Appeals, certified under your hand and the seal of the Court.

Samuel D. Jackson,
Samuel D. Jackson,
Attorney General of Indiana,
Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for Defendants-Appellees.

Endorsed: Filed Nov. 20, 1940. Kenneth J. Carrick, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed (excepting briefs of counsel, and petition for leave to two counsel to argue cause, and order thereon) in the following entitled cause:

Cause No. 7126.

The Wood Preserving Corporation,
Plaintiff-appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*,
Defendants-appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of December A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 3, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the procedings below which accompanied the petition shall be treated as though filed in response to such writ.